This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

LNA
JCL
JF

625
Cape of Good Hope Supreme Court.

REPORTS OF ALL CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE MONTHS OF JANUARY, FEBRUARY AND MARCH, 1894.

(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE SUPREME COURT.

SUBSCRIPTION PER ANNUM, £2 2s. POST FREE.

VOL. IV.—PART I.

CAPE TOWN:

PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S ST.

1894.

TABLE OF CASES.

	PAGE
Alberts' Trustee v. Kaplan and Others	59
Aliwal North Board of Executors v. Diesel	31
Argus Co. v. Chambers	99
Aspeling v. Du Toit and Others ...	2
Austin v. Osborne	33
Bank of Africa v. Rechter	3
Batchelder v. Batchelder ...	36, 98, 100
Bayly v. Bayly	10, 12, 70
Behrens v Behrens	72
Bell, *re*	107
Berkeley, *ex parte*	100
Bester, *in re*	53
Bevern's Trustees v. Kretschmar ...	26
Bezuidenhout, *ex parte*	100
Bierman's Ins. Estate, *re*	53
Blackenberg v. The Colonial Government	61
Brenner & Others v. Duncombe ...	35
Breytenbach v. Smits' Executors ...	98
Broad v. Schultz and Smith ...	64, 72, 98
Brown v. Bruce	33
Bryant's Trust, *re*	6
Burger, *ex parte*, *re* Burger's Will ...	105
Burghersdorp Reformed Church v. Coetzee	72
Cape of Good Hope Bank (in liquidation), *re*	3, 10
Cape Stock Farming Company, *re* ...	11
Carslaw v. Koch	24
Cauvin v. Cardinal	99
Chism, *in re*	31
Chowles, *ex parte*	13
Cilliers v. Benadie	53
Clark v. Town Council of Cape Town ...	42
Classen v. Lerm	98
Coetzee, *ex parte*	32
Colonial Government v. Schermbrucker	60
Crockart's Will, *re*	100
Currey v. The Incorporated Law Society	15
De Bruyn's Executors v. Wahl ...	99
Delport v. Le Roux	3
De Smit v. Afzelius ...	27, 53
De Witt v. Cape Canning Co. ...	36
Dickson & Co. v. Levy	51
Dixon v. Dixon	13
Dobson's Estate, *re*	14
Doubell v. Tipper	37
Du Plessis v. Du Plessis	14
Du Preez's Estate, *re*	108
Du Preez v. Van Coller	72
Dutch Reformed Church Stanford, *re* ...	36
Duthie v. Benn	67
Eady v. Eady	31, 53
Eastern Province Guardian Co., *re* ...	7
Eaton, Robins & Co. v. Vos	2
Edmeades' Insolvent Estate, *re* ...	36
Eilenberg v. Beyers	71
Fagan's Estate, *re*	10
Falconer v. Behr & Co.	69
Ferreira's Estate, *re*	4
Findlay & Tait v. Marais	3
Firbank, *ex parte*	3
Fletcher & Co. v. Froneman	3
Fraser v. Frank Johnson & Co. ...	79
Garlake, *ex parte*	71
Garlick and Ruddle, *ex parte*	10
Gerrand, *ex parte*	31
Glaiser's Executors v. Quin	14
Glynn, *ex parte*	3
Goodwin v, Stanton	1
Greef v. Van der Westhuysen ...	28
Greef's Executrix v. Lewin	31
Green v. Fuller and Coetzee	2
Greyvensteyn, *ex parte*	3
Guthrie, *ex parte*	99
Hall v. Hill	99
Hanau v. Marais	3
Henderson, *ex parte*	35
Herman's Executors v. Van Heerden ...	31
Heydenrych v. Farmer	44
Home, *ex parte*	53
Hopkins, *ex parte*	59
Hudson, Vreede & Co. v. Kuper ...	2
Incorporated Law Society v. Phear ...	15
Irvine, *ex parte—re* Bullen's Insolvent Estate	1

	PAGE
Irvine v. Irvine	48
Jaarsveld's Estate, *re*	59
Jagger & Co. v. Robb	31
Jagger & Co. v. Teich	2
Jansen, *ex parte*	3
Johnson, *ex parte*	71
Jooste v. Adamstein	59
Jooste v. Petzer	77
Jordaan's Trustee v. Fletcher & Co. ...	64
Kennemeyer, *ex parte*	86
Kingsmill and Anderson, *ex parte* ...	100
Klopper v. Van Straten	101
Koch v. Carslaw	24
Koch v. Mair	12, 72, 88
Koller's Executors, *ex parte*	32
Kruger, *ex parte*	71
Landry, *ex parte*	7
Larkin (Minors), *re*... ...	11, 12
Lawrence v. Lotter	13
Leeu v. Leeu	71
Lennon & Co. v. Chambers	2
Le Roux v. Fuller	2
Lewin's Ins. Estate, *re* ...	73, 108
Lewis & Co.'s Intestate Estate, *re* ...	108
Lloyd, *ex parte*	53
Longworth & Co. v. Morton	13
Lotter (Minors), *re*	4
Lourens' Estate, *re*	1, 18
Lourens v. Lourens' Trustee ...	36, 72
Louw v. Louw	33, 36
Lyons and Smith, *ex parte*	98
Mahomet v. Abba	2
Makalela v. Makalela	13
Master v. Berrangé	86
McGrath v. McGrath	7
McKay's Estate, *re*	14
McLeod, *ex parte*	35
McLeod, *ex parte*, *re* Berry's Estate ...	00
McLeod's Ins. Estate, *re*	99
Meiring, *ex parte*	3
Mendelsohn v. Judelsohn	53
Meyer's Intestate Estate, *re*	53
Michau, *ex parte*	31
Michler v. Saunders	38
Miles' Estate, *re*	107
Molteno, *ex parte*	71
Moore and Saayman's Ante-nuptial Contract, *re*	4
Morgan & Small v. Young	48
Morris v. Wessels	99
Myburgh *ex parte*	99
Odendaal v. Swart	53
Oliver v. Oliver	13, 71
Oppenheimer v. Steel	71
Palmer's Estate, *re*	3
Paxman v. Paxman	71
Pearce v. Pearce	34
Pepler *ex parte*	35
Pote v. Gerrard	2
Potgieter v. Van der Heever's Executors	66
Price v. Priee	100
Prince, N. O., v. Adam & Zoer ...	9
Prince, Vintcent & Co. v. Friedman ...	2
Prin's Executors v. Lind	4
Purcell v. Fatima	53
„ v. Purvis	53, 71
„ v. Watson	99
Randall v. Graham's Town Municipality	39
Reed, *re*	107
Regina v. Cooper & Another	104
Regina v. Jantje Sly	8
„ v. Neethling	7
„ v. Rensburg & Others ...	78
„ v. Ruiters	1
„ v. Sampson Groeneveld & Others	64
„ v. Solomon	108
„ v. Van Rensburg	35
„ v. Wright	104
Reynders v. Reynders	31
Riedemann (minors), *re*	99
Rosich v. Rosich	71
Rose & Co. v. Loubser	99
Rothman, *ex parte*	31
Russouw's, Estate *re*	108
Rowe v. Rowe	27
Sadie *ex parte*	3
Sagar, *ex parte*	98
Schnitzler *ex parte*	35
Scholtz v. Dean	2
Sharpe's Executors v. Van der Byl ...	2
Shoebel's Executrix v. Van Rooyen ...	14
Small & Morgan v. Young	48
Smit v. Dean	107
„ v. Gabier	107
Smith v. Broad	14
Smith v. Muff, trading as James & Co. ...	33

	PAGE
Sayman's Insolvent Estate *re*... ...	9
South African Association v. Visser ...	2
„ „ L. & A. Co. v. Carslan & Koch	59
„ „ Orphan House v. Beedle	99
Spolander v. Spolander	73
Standard Bank v. Oppenheim ...	8
Steele v. Steele	4
Steyn's Executors v. Steyn	75
Stier v. Louw	31
Stone's Estate *re*	108
Straus, *ex parte*	7
Streak v. Streak	36
Swanepoel v. Birk	6
Theron v. Woolf	18
Town Council of Cape Town v. Dawes	53
Tyfield v. Tyfield	72
Van der Byl & Co. v. Fuller	99
Van der Heever v. Van Rooyen ...	73
Van Dyk, *ex parte*	1
Van der Spuy, *ex parte*	4
Viljoen's Trustees v. Viljoen and Others	13
Wagner v. Wagner	11, 43
Wasserfall v. Wasserfall	14
Wentzel & Schleswig v. Smuts ...	100
Wessels' Petition, *re*	14
White, Muller & Co. v. Fuller & Coetzee	2
Wilhelm v. Beamish	19
Wisdom & Co. v. Horn & Co. ...	53
Wolff v. Solomon's Trustee	1
Wolff's Executor v. Neser	13
Wood Bros. Ins. Estate, *re*	59
Woodhead, Plant & Co. v. Gunn ...	20
Zackon v. Van Rhyn and Arp's Trustee	101

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

GOODWIN V. STANTON. { 1894. Jan. 3rd

Mr. Graham moved for the removal of the suit between the parties for trial to the Eastern Districts Court.

The order was granted.

Ex parte IRVINE—*Re* BULLEN'S INSOLVENT ESTATE.

Petition of John Irvine, of Port Elizabeth.

On 8th June, 1881, the petitioner purchased from one Alfred Bullen certain four lots of ground off Walmer-road, in the division of Port Elizabeth, for £46.

Bullen's estate was sequestrated as insolvent on the 6th May, 1887, and one Howson H. J. Rutherford (now dead) was elected and confirmed sole trustee.

The petitioner never received transfer of the property, which still remains registered in the name of Alfred Bullen, although he paid the purchase price and has occupied the land since he purchased it.

The prayer was that the Court might be pleased to order proceedings to be taken for the appointment of a new trustee in Bullen's estate, the petitioner undertaking to bear the costs attending the making of the appointment.

Mr. Graham was heard in support of the application.

The Court granted the order as prayed, on condition that the costs were paid by the petitioner.

WOLFF V. SOLOMON'S TRUSTEE.

Mr. Searle, Q.C., applied for the issue of a commission to take the evidence of two witnesses for the defendant in London.

The Court granted the application and appointed Mr. Mackarness commissioner.

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. RUITERS. { 1894. Jan. 9th.

Case on review from sentence passed by Resident Magistrate of Oudtshoorn.

The prisoners, Dial and Jacob Ruiters, were charged with the theft of three goats. The case was remitted by the Attorney-General under Act 43 of 1885.

The prisoners pleaded not guilty; they were found guilty, and sentenced to eighteen months' imprisonment with hard labour.

Mr. Justice Upington, in referring to the case, said: The 4th section of Act 43 of 1885 safeguards the Magistrate's jurisdiction under Act 12 of 1860 and Act 17 of 1867, but as in the present case the convicted persons pleaded not guilty the Act 12 of 1860 cannot apply, and Act 17 of 1867 would not give the Magistrate power to sentence the prisoners to eighteen months' imprisonment, which he has done. The sentence must be reduced accordingly to twelve months' imprisonment with hard labour. It strikes me the Magistrate did not look closely into the terms of the remit from the Attorney-General, and so made an error in the extent of his jurisdiction.

Re LOURENS' ESTATE.

Mr. Watermeyer applied for the appointment of a provisional trustee with power to administer the estate.

The Court appointed Mr. John Cairncross provisional trustee with full powers of administration.

Ex parte VAN DYK—*Re* MINOR GROENEWALD. { 1894. Jan. 9th.

Petition of Burgert Johannes van Dyk, of Haardewegs Rivier, in the district of Caledon.

The petitioner alleged that he was the tutor dative of the minor Maria Anna Susanna

Groenewald, who resided with him at Haardewegs Rivier, where there was no school at which she could be properly educated.

That she was nearly sixteen years old, and was anxious to attend school, for which purpose a sum of £25 per annum would be required.

That the sum of £159 6s. 3d., the paternal and maternal inheritance of the minor, was in the hands of the Master.

The prayer was for an order authorising the Master to pay to the petitioner £25 per annum for two years for the minor's education.

The matter was referred to the Master and he reported in favour of the prayer being granted.

Mr. Sheil was heard in support of the application.

The Court granted the order as prayed in terms of the Master's report.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS. K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

MAHOMED V. ABBA. } 1894. Jan. 12th.

Mr. Graham moved for provisional sentence on an unsatisfied judgment for £5 19s. and £1 13s.

Granted.

EATON, ROBINS AND CO. V. VOS.

Mr. Watermeyer moved for the final adjudication of defendant's estate.

Granted.

POTE V. GERRARD.

Mr. Sheil moved for provisional sentence for £100 on two promissory notes, with interest from the dates on which they fell due, less £8 paid on account.

Granted.

PRINCE, VINTCENT AND CO. V. FRIEDMAN.

Mr. Graham moved for provisional sentence on two promissory notes for £208 6s. 10d. and £139 13s. 11d., with interest thereon.

Granted.

SCHOLTZ V. DEAN.

Mr. Graham moved for provisional sentence for £53 8s 10d., less £31 19s. 5d. paid on account.

Granted.

LE ROEX V. FULLER.

Mr. Sheil moved for a decree of civil imprisonment on an unsatisfied judgment of this Court for £73 and £19 12s. 3d. costs.

Decree granted with costs.

SHARPE'S EXECUTORS V. VAN DER BYL.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £227 10s., with interest at 6 per cent. from the 3rd April, 1891.

Granted.

SOUTH AFRICAN ASSOCIATION V. VISSER.

Mr. Webber moved for provisional sentence for £80 3s. 7d., less £9 16s. 5d. already paid being interest on a mortgage bond for £1,000.

Granted.

ASPELING V. DU TOIT AND ANOTHER.

Mr. Graham moved for provisional sentence for £500, with interest at 6 per cent. from 1st January, 1893, upon a mortgage bond.

Granted.

HUDSON, VREEDE AND CO. V. KUPER.

Mr. Graham moved for official adjudication of defendant's estate.

Granted.

JAGGER V. TEICH.

Mr. Watermeyer moved for judgment under rule 329 for £72 1s. 6d., less £25 paid on account.

Granted.

LENNON V. CHAMBERS.

Mr. Buchanan moved for judgment under rule 329 for £20 19s. 9d.

Granted.

WHITE, MULLER AND CO. V. FULLER AND COETZEE.

Mr. Graham moved for judgment under rule 329 for £46 9s. 4d. and £12 8s. 6d., with interest and costs, for goods sold and delivered.

Granted.

GREEN AND CO. V. FULLER AND COETZEE.

Mr. Shippard moved for judgment under rule 329 for £4 17s. 3d.

Granted.

FLETCHER AND CO. v. FRONEMAN. { 1894. Jan. 12th.

Summons—Provisional sentence—Rule 329 (*d*)—Judgment by default.

Judgment by default was prayed under Rule 329 (d) upon an illiquid summons for the amount of a promissory note, copy of which had not been served on the defendant as required by the 12th Rule of Court in liquid cases.

Held, *that the 329th Rule was not intended to put an end to the system of provisional sentence in undefended cases and judgment by default refused accordingly.*

Mr. Watermeyer moved for judgment under rule 329 (*d*) on a promissory note for £154 18s. 9d.

A copy of the note had not been served with the summons.

Judgment was refused.

The Chief Justice said: Judgment is asked against the defendant under Rule 329 (*d*) upon a promissory note made by him.

The established practice of the Court has hitherto been that where judgment is sought upon a liquid document the summons is for provisional sentence under security.

Under the 12th Rule of Court the copy of the document must be served on the defendant with the summons.

In my opinion the 329th Rule of Court was not intended to dispense with such service.

If judgment were given as now prayed, we should practically put an end to the whole system of provisional sentence in undefended cases, a system which has worked well was not intended to be altered by the later rule. Judgment must therefore be refused on the summons.

Their lordships concurred.

Judgment was given in the following illiquid cases: Smit v. Dean, Bank of Africa v. Rechter, Findlay & Tait v. Marais, Hanau v. Marais. Consent papers were filed in the three last cases.

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted their rehabilitation: Ernest J. Jansen, J. W. H. Meiring, sen., J. W. Glynn, Chris. Firbank, G. P. C. Greyvensteyn, and F. A. Sadie, jun.

GENERAL MOTIONS.

Re THE CAPE OF GOOD HOPE BANK. { 1894. Jan. 12th.

Mr. Innes, Q.C., moved for an order in terms of the sixth report of the official liquidators. The report has already been published.

The Chief Justice said it was the unanimous opinion of the Court that the work of the liquidation had been exceedingly well and judiciously done. The Court thought 5 per cent. upon all receipts since 26th September would be the very least remuneration to which the liquidators would be entitled. Even after allowing that remuneration the percentage of costs had been very small indeed compared with other liquidations which were known to the Court. The Court would therefore make the order as prayed, and would fix the 31st March as the date for final proof by creditors.

IN THE ESTATE OF THE LATE GEORGE PALMER.

Mr. Sheil asked the Court to make absolute the rule *nisi* issued under the Titles' Registration and District Lands Act for registration in the name of the said estate of certain small piece of land, being part of erf No. 21, High-street, Graham's Town, which the executors are satisfied was purchased and paid for by the said Palmer, but of which no record can be traced.

Granted.

DELPORT v. LE ROUX. { 1894. Jan. 12th.

This was an application for an order restraining the respondent from trespassing on applicant's property, being a sub-divided portion of the farm Rietvlei, in the division of Oudtshoorn; and further, for an order that he do pay the costs of this application.

The evidence showed that it was owing to the action of the applicant in blocking up the only road, except the bed of Oliphant's River, which led to one of the respondent's farms, that the trespass took place.

Mr. Sheil was heard in support of the application.

Mr. Searle, Q.C., for the respondent.

The Chief Justice said: This application must be refused with costs. The applicant has brought the whole matter upon himself by first putting the fence across the road which respondent was entitled to use. It could never have been intended that the bed of the Oliphant's River was to have been the means of access or egress to the property, and the very fact that the private road had hitherto been used showed that

that (the private road) must have been the recognised means of access to respondent's property. When that was closed, the respondent used what he considered an old road existing from time immemorial, and for the purpose of using it he broke down the fence which had been placed across it. I do not think there was such violence used by the respondent as had been alleged. No more violence was used than was absolutely necessary for the purpose of reaching his own property.

Mr. Searle asked for an interdict restraining the applicant from putting a barricade across the private road.

The Chief Justice said there ought to have been a cross application and notice on this point. The order granted was sufficient.

STEELE V. STEELE.

This application was for an order authorising the payment to the petitioner out of funds to the credit of her husband in the Post-office Savings Bank, but which he has been interdicted from withdrawing, a sum of money to enable her to institute proceedings against him for a judicial separation.

Mr. Graham for applicant.

Mr. Sheil for respondent.

The Court made the order as prayed, fixing the amount at £15, but made no order as to costs.

IN THE MATTER OF THE MINORS LOTTER.

Mr. Tredgold moved for authority to the mother and natural guardian of the said minors to act on their behalf jointly with her major sons in passing a mortgage bond on the farm Volkers Rivier, in the district of Somerset East, sold by her to them, she agreeing to pay the interest on the amount chargeable to the minors.

The Court made the order.

IN THE INSOLVENT ESTATE OF IGNATIUS S. FERREIRA.

Mr. Graham moved for an order directing that proceedings be taken for the election of a new trustee to the said estate, the original trustee being dead, for the purpose of realising certain assets recently discovered, and further, that the costs of this application shall be a charge against such estate.

The Court made the order.

Ex parte VAN DER SPUY *Re* MOORE AND SAAYMAN'S ANTE-NUPTIAL CONTRACT. } 1894. Jan. 12th.

Ante-nuptial Contract—Delay in registration—Notary Public—Costs.

Where through the omission of a Notary Public an ante-nuptial contract was not registered within the time prescribed by law, the Court ordered the registration of the contract on condition that any expenses occasioned by the delay, including the costs of the application for registration, should be paid by the Notary.

Petition of Herman van der Spuy, of Oudtshoorn, Notary Public.

On the 16th November, 1893, an ante-nuptial contract between Edwin Thomas Moore and Margaretha Susannah Saayman was executed before the petitioner as a Notary Public.

The petitioner alleged that owing to his unavoidable absence from office on business copies of the contract did not arrive in Cape Town in due time for registration as required by law.

The prayer was for an order authorising registration.

Mr. Tredgold was heard in support of the application.

The Court granted the order as prayed, on condition that any expenses occasioned by the delay, including the costs of the present application, be paid by the petitioner, and saving the rights of intervening creditors.

[Petitioner's Attorneys, Messrs. Fairbridge & Arderne.]

PRINS' EXECUTOR V. LIND. } 1894. Jan. 12th.

Power of attorney—Revocation—Sale of land—*Fidei-commissum.*

Where a testamentary executor had given a power of attorney authorising the person to whom it was given to administer the estate, and the latter acting under the power had sold landed property burthened with a fidei-commissum, *the Court refused to grant an order restraining the holder of the power from giving further effect to it, leaving the applicant to his remedy by action for maladministration.*

This was an application on notice calling upon the respondent to show cause why an order should not be granted restraining him from giving further effect to a certain power of attorney, or any power or authority granted by the applicant in respondent's favour, in connection with the administration of the estate of the late Regina Prins and surviving spouse, Goliath Prins, pending an action to be brought by the applicant for the cancellation of the sale referred to in the applicant's petition.

Under the joint will of Regina Prins and her surviving husband, the applicant was appointed executor testamentary, and thereafter he took out letters of administration.

The applicant in his capacity as executor granted a power of attorney to the respondent to administer the joint estate of the late Regina Prins and her surviving husband.

The provisions of the will burthened the landed property belonging to the joint estate with a *fidei commissum* in favour of the grandchildren of the testators up to the third generation.

The applicant alleged that the liabilities of the joint estate amounted approximately to £600.

That the respondent, acting under and by virtue of the power of attorney granted to him by the applicant, caused to be sold by public auction on 14th June, 1893, all the landed property belonging to the joint estate, and one Botha became the purchaser thereof for the sum of £1,286.

The applicant said that his views and suggestions with respect to the mode and manner of the administration and adjustment of the estate were misconstrued by the respondent, who had no right to sell all the landed property, as he (the applicant) had no such right in the face of the express prohibition of the will.

The applicant contended that he was entitled to an order restraining the respondent from giving effect to any authority granted by him (applicant) to the respondent, and also for an order restraining the Registrar of Deeds from passing title and conveyance of any portion of the landed property belonging to the joint estate in favour of Botha, pending an action which applicant intended instituting forthwith for cancellation of the sale, and for other relief.

The respondent, in his answering affidavit, alleged *inter alia* that the power of attorney granted to him by the applicant authorised him to sell the assets of the estate, which consisted solely of landed property, valued for Divisional Council purposes at £1,108.

That the debts amounted to approximately £600.

That he accepted the management of the estate at the request and urgent solicitation of the applicant and of his father (the surviving spouse), but on the distinct understanding that he was to be left with a free hand, and to have sole control and management of the estate, and to administer the same as he might be advised.

That the surviving spouse had repudiated the joint will and claimed his share of the joint estate.

That it would have been impracticable to have mortgaged the property for the payment of debts, and that therefore, in the interests of all concerned, and after due deliberation and consultation, he decided that the best course was to sell the property by public auction, with which suggestion the applicant fully concurred.

This was accordingly done, and the landed property was publicly sold to Botha for the sum of £1,286.

That the sale was extensively advertised and was held with the full knowledge and consent of the applicant, who was present and gave respondent instructions from time to time.

That there was a good attendance and that the price realised was fair and reasonable, and that the other two heirs were also present and no protest was raised against the sale.

The respondent contended that the power of attorney was irrevocable, and alleged that in pursuance of it he had incurred large liabilities in connection with the administration of the estate, more especially in regard to the sale of the property, and that consequently he felt bound to consider the power irrevocable unless indemnified for all costs and liabilities incurred whilst acting in pursuance of the authority so vested in him.

The applicant in his replying affidavit alleged that he had only consented to the sale on the respondent's representation that the sale had been ordered by the Supreme Court.

He further stated that the purchaser was prepared to cancel the sale.

As stated above, the property was sold on the 14th of June, 1893, and on the 25th October following the applicant, through his attorney, wrote to the respondent revoking the power of attorney, and refusing to confirm the sale.

He also wrote to the purchaser giving him notice of his refusal to confirm the sale and calling upon him to give up possession of the property within eight days, otherwise an action would be instituted.

The respondent, in his reply to the letter of the 25th October, took up the position that the power of attorney was irrevocable, and denied the applicant's right at that stage to revoke or cancel it. He further alleged that the applicant was fully aware of his position, and that the sale took place with his full knowledge and consent.

Mr. Graham was heard in support of the application.

Mr. Searle, Q.C., for the respondent.

The Court refused the application, with costs.

The Chief Justice said: It appears to me that the applicant has quite mistaken his remedy in this case. His proper course was to have given notice to Mr. Lind that the power of attorney

was revoked, and to have given notice to the Registrar of Deeds to the same effect. In such a case I have no doubt but that transfer would not have been passed. But instead of doing that an application is made to the Court to revoke the power. It is not the duty of the Court to revoke powers of this kind. If in this case the applicant has an action for damages against Mr. Lind for maladministration, the decision of the Court now will not affect that action. On the other hand, if Mr. Lind has effected a sale, and wishes to act upon it by transfer of the land, I do not think his position would be so untenable as if he had declined to act upon it. On the whole, I think this application should be refused with costs. If hereafter an action of damages should be brought, the decision of the Court now would be borne in mind, but this was no reason for refusing the respondent his costs. There is another point. I do not wish to encourage the applicant now in giving notice to the Registrar of Deeds, unless it is clear that the purchaser is prepared to forego the sale. If he is prepared to do so, I have no doubt Mr. Lind will give his consent.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

SWANEPOEL v. BIRK. { 1894. Jan. 12th.

Attachment—Inheritance—Marriage in community—Judgment—Costs.

The Court ordered the attachment and sale of an inheritance, to which a woman married in community of property was entitled after the death of her surviving parent, to satisfy a judgment against her husband.

This was an application on notice calling upon the respondent to show cause why an order should not be granted authorising the Sheriff of the Colony to attach and sell in execution the interest accruing to him, as being married in community of property to his wife Petronella Birk (born Steyn), out of the estate and in terms of the will of his late father-in-law, Barend Johannes Jacobus Steyn, on the grounds set forth in the applicant's affidavit.

The facts, as stated in the affidavit, are these:

On 25th August, 1893, the applicant recovered by judgment of the Supreme Court the sum of £36 6s. and costs of suit against the respondent.

On 21st October he issued a writ for the amount of the judgment and taxed costs, then amounting to £76 6s. 1d.

The Sheriff made a return of *nulla bona*, and further costs were incurred.

In terms of the will of the respondent's wife's parents, to whom he is married in community, the survivor remains in possession of the joint estate, which upon her death is divisible amongst their children.

The applicant prayed for an order authorising the Sheriff to attach and sell in execution in settlement of the capital and taxed costs aforesaid, and the costs of this application, the interest of the respondent under the will of his father-in-law and surviving spouse.

Mr. Graham was heard in support of the application.

The Court granted the order as prayed.

[Applicant's Attorney, C. C. Silberbauer.]

Ex parte BRYANT. { 1894. Jan. 12th.

Trust—Death of trustees—New appointment.

Where money had been settled on trustees resident in England, and they had invested it in landed property in this colony, and had subsequently died, and their executors refused to administer the trust, the Court on the application of the cestui que trust *appointed a new trustee.*

Petition of Anna Priscilla Bryant (born Philcox).

The facts, as stated in the petition, are these.

By a certain indenture or deed of agreement dated 22nd May, 1861, certain money belonging to the petitioner was by her vested in the trustees named in the indenture, who were resident in the United Kingdom, upon certain terms and conditions.

The trustees appointed under the deed were one Darton and one Croft.

Amongst the conditions it was provided that the trustees might, if they thought fit, invest the money vested in them in the purchase of landed property in this colony.

The trustees did purchase certain landed property at Cape Town and at the Knysna, but thereafter Croft died and Darton remained sole trustee.

The property at Cape Town was transferred to Darton as surviving trustee, in trust for and on behalf of the petitioner (wife of James Bryant), under and by virtue of a deed of settlement and trust deed dated 28th May, 1861.

The property at the Knysna was transferred in similar terms to Darton and Croft.

Thereafter Darton died and the trustees' executors declined to have anything to do with the property or the trust money. The landed property still remains registered in the names of the trustees.

The petitioner alleged that from time to time she had borrowed from her husband, to whom she was married without community of property, for the purpose of paying rates, taxes, insurance, and repairs to the properties, the sum of £500.

That she was desirous of repaying this amount, but had no means unless she either disposed of or mortgaged the landed property in question.

That she was not under the circumstances able to sell, inasmuch as she could not give transfer, and for the same reason could not mortgage, because the trustees who should pass the bond were both dead.

That the trust was a self-imposed one, which she was now desirous of cancelling.

The prayer was for:

(a) An order cancelling the trust and granting the petitioner leave to have the property transferred into her own name to deal with as she might think fit. Or,

(b) An order appointing a new trustee in place of those deceased, with authority to take transfer of the property in question, and to mortgage the same for any sum which she might require either to repay sums already borrowed, or any sums that might hereafter be required for repairs, rates, or taxes.

Mr. Searle, Q.C., was heard in support of the application.

The Court appointed Mr. Charles de Smit, of Beaufort West, trustee in lieu of the deceased trustees.

[Petitioner's Attorneys, Messrs. Van Zyl and Buissinne.]

MCGRATH V. MCGRATH.

Mr. Buchanan moved, [on behalf of Emily McGrath, for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce.

The Court granted leave to sue by edictal citation, the citation to be returnable first day of August next, personal service if posible, failing which, one publication in the "Gazette," one in the "Cape Times," and one in the "Cape Argus."

Re THE EASTERN PROVINCE GUARDIAN COMPANY.

Mr. Sheil moved for authority to the Master of the Supreme Court to pay out to the said company certain surplus funds arising out of the sale in execution of the derelict lots of land in Port Elizabeth, mortgaged by one Alex. S. Brown, the owner, to petitioners, the bond hypothecating the same having been lost or mislaid.

Granted.

THE PETITION OF SYBRAND E. STRAUS AND OTHERS.

Mr. Sheil moved to make absolute the rule *nisi* for cancellation in the Debt Registry of certain bond passed by petitioners in favour of H. C. Nieuwoudt for £179 4s. 8d., hypothecating certain lands known as the farms Zoetwater and Driekoppen, in the district of Clanwilliam, which bond was duly paid by petitioners but the receipt destroyed by fire.

Granted.

PETITION OF JOSEPH EUGENE LANDRY.

Mr. Graham applied, on behalf of petitioner, for registration of certain property at Port Elizabeth under the Titles' Registration Lands Act.

The Chief Justice said the Court would make the rule absolute in this case, subject to the production of papers showing that due publication had been made.

REGINA V. NEETHLING. { 1894. Jan. 12th.

Public road—Swing-gate—Fence—Act 40 of 1889.

It is not necessary that a swing-gate constructed under the 153rd section of Act 40 of 1889 should swing on both sides of the fence on which it is placed.

It is not necessary that such a fence should form part of a complete enclosure, provided that it has been constructed not for the purpose of delaying free passage over a public road, but bona fide *for the use and convenience of the owner.*

Appeal from a sentence passed upon the appellant by the Resident Magistrate of Swellendam.

The accused was charged with the crime of contravening section 154 of Act 40 of 1889, in that upon or about the 4th December, 1893, and at or near Rustenburg, in the district of Swellendam, he did wrongfully and unlawfully contravene the above section by failing or neglecting to close and fasten a certain gate on the public road after passing through the same, the property of Mr. John Knoblauch, a farmer residing at Rustenburg aforesaid.

The accused excepted to the summons on the grounds that the charge was vague and informal

as it was not alleged in the summons that the gate in regard to which the offence was supposed to have been committed was one constructed in terms of section 153 of Act 40 of 1889.

The exception was overruled.

It appeared from the evidence that the accused on the 4th December, 1893, passed through the gate in a cart and left it open after him.

The gate in question is a swing-gate, but only opens one way, and is constructed in a wire fence, which partly encloses the farm on one side but is erected about 100 yards from the boundary of the adjoining farm.

The accused was found guilty, and sentenced to pay a fine of £2, or in default seven days' imprisonment.

From this sentence the accused now appealed.

Mr. Searle, Q.C., was heard in support of the appeal.

He contended that the gate was not a proper swing-gate, inasmuch as it did not swing on both sides of the fence, and that the fence was not such a fence as was contemplated by the Act, and that consequently the conviction should be quashed.

Mr. Giddy for the Crown was not called upon.

The Court dismissed the appeal.

The Chief Justice said: The first question in this appeal is whether the gate which the appellant was charged with leaving open is a swing-gate in terms of the 153rd section of Act No. 40 of 1889. The contention on his behalf is that it should swing on both sides of the fence, but the Act does not say so. The only requirement is that such swing-gate shall allow free passage to persons entitled to use the road. There might perhaps be the very slightest inconvenience to travellers in not having the gate swinging both ways, but certainly not enough to justify the Court in holding that free passage is obstructed. Certainly, no Court would hold that a person could be prosecuted under the proviso to the section merely because the gate placed by him does not swing both ways. The next question is whether the fence in which the gate was placed is such a fence as was contemplated by the Act. It does not form a perfect enclosure, for at the one end it touches a "krantz," which itself would form a natural fence, and on the other side it reaches the homestead of the owner, who constructed the fence, and there the fence is not continued. It is clear therefore, that although the fence does not form a perfect enclosure it is very useful to the owner to keep in his own cattle and prevent trespassing on the part of others. At all events the Magistrate who knows the spot, found that it was a fence *bona fide* constructed for the owner's use and convenience, and if he is right, as in my opinion he is, the fence is of the nature contemplated by the Act. As to the objection that the summons does not sufficiently disclose the offence charged, the summons specifies the section said to have been contravened, and therefore it was not necessary to add more than that the accused had "failed or neglected to close and fasten a certain gate on the public road after passing through the same, the property of Mr. Knoblauch," &c.

The appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. JANTJE SLY. { 1894. Jan. 16th.

Act 23 of 1888 section 28.

An unconvicted prisoner found guilty of an offence under section 28 *of* Act 23 *of* 1888, *cannot be sentenced to receive lashes.*

This case came on review from a sentence passed upon the prisoner by the Resident Magistrate for Namaqualand.

The accused, an unconvicted prisoner, was with two convicted prisoners indicted for contravening Act 23 of 1888, section 28.

All the prisoners were found guilty. Two convicted prisoners were sentenced to twelve months, with hard labour, to take effect at the expiration of their former sentence, and Jantje Sly was sentenced to three months' hard labour, and to receive fifteen lashes.

Mr. Justice Upington said: In the case of Sly the lashes must be struck out of the sentence, as he was an unconvicted prisoner. The Magistrate has evidently lost sight of the case of *Regina* v. *Lottering* (2 Sheil, 178).

THE STANDARD BANK V. OPPENHEIM. { 1894. Jan. 16th.

This was an application for an order to attach certain property *ad fundandam jurisdictionem* in an action about to be instituted for payment of the sum of £3,750 on a guarantee. It appeared

from the petition that in 1890 one Le Croix was indebted to the Standard Bank in the sum of £6,405, against which they held scrip. The bank granted an extension of time to December 31, 1893, within which this amount should be paid, in consideration of the present respondent becoming surety for a sum not exceeding £3,750. Demand had been made upon respondent's agent in Pretoria, who refuse to recognise the cloim. Petitioners alleged that the business carried on by Messrs. Trebor Freres at Woodstock was the property of respondent and his brother, and they asked for leave to attach the land and premises to found jurisdiction in an action about to be instituted by the applicants for the recovery of the above-mentioned sum of £3,750.

Mr. Graham was heard in support of the application.

The Court ordered the matter to stand over until notice of the application had been given to Messrs. Trebor Freres, after which the application might be renewed before Mr. Justice Upington in his chambers.

Re SNYMAN'S INSOLVENT ESTATE.

Mr. Tredgold applied for the appointment of a new trustee in the above insolvent estate, the late trustee having died in December, 1892, and there still being assets in the estate.

The Court directed the Master to proceed under the 52nd section of the Ordinance.

SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

PRINCE, N.O. V. ADAM AND ZOER. { 1894. Jan. 23rd.

Commission—Practice.

A person who takes out a commission should give the other side notice as to when and where the commission is to meet and witnesses be examined.

Application on notice calling upon the plaintiff (present respondent) to show cause why he should not be ordered to produce the affidavits of Messrs. Dull and Dresselhuys, or other directors or officials of the company of which the plaintiff is the liquidator, making discovery on oath of all documents which are or have been in their respective possession relative to the dealings of one Herman Klosser, and why the trial of the cause should not be postponed until such affidavits have been made and produced, or until the evidence of the said Dull and Dresselhuys, or other directors or officials, shall have been given and returned under the commission granted on the 24th February, 1893.

The facts are briefly these:

On the 24th February last an application was made to the Court by the defendants for an order requiring the plaintiff and certain officers of the company represented by him to make discovery on oath of all documents relative to their dealings with one Herman Klosser and for the postponement of the trial until certain affidavits should have been made.

The plaintiff discovered all documents in his possession, but the order was asked to be extended to Messrs. Dull and Dresselhuys, who reside in Holland, and who, the defendants alleged, had documents in their possession which it was necessary they should make discovery of.

The Court held that it was impossible to grant an order of discovery on persons residing out of the jurisdiction, but suggested that if the plaintiff consented a commission should issue to take the evidence of Messrs. Dull and Dresselhuys, and such other witnesses resident in Holland, as either party might produce in reference to the matters at issue in the above-named cause. The plaintiff consented to this course.

The order appointing the commission was taken out by the plaintiff, and on the 8th March, 1893, the plaintiff's attorneys informed the defendants' attorneys that they were forwarding to the company in Amsterdam the commission and certain papers connected with the case by the mail leaving on the 15th March, with instructions to have the commission executed at once.

The commission, however, was not held, nor did either party take any further steps save that the plaintiff set down the case for trial on the 5th February next.

Mr. Graham was heard in support of the present application.

Mr. Searle, Q.C., for the respondent.

The Court granted the application.

The Chief Justice said: I think the application should be granted as prayed. The application for discovery was not pressed because the plaintiff consented to a commission. At the

commission two witnesses were to be examined for the plaintiff. The usual course in such cases is that the person who takes out the commission sets the whole machinery in motion. He gives notice to the other side as to the time and the place where the commission is to meet and where the witnesses are to be examined. Nothing of the kind was done by the plaintiff in the present case. The defendant was ready to cross-examine any witnesses produced, but nothing whatever was done by the plaintiff during the long interval of time from February, 1893. In my opinion it was the duty of the plaintiff after taking out the commission, and after withdrawal of the application for discovery, to have proceeded and set the machinery in motion. It was quite impossible now for the defendants to go to trial on the date set down, and they were quite entitled to have the application granted, either the application for discovery or else for the examination of the witnesses, and also to have the trial postponed until either the affidavits were produced or the commission had sat. The order would be granted.

Mr, Justice Upington: If costs had been asked for I should have been inclined to grant them.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorneys, Messrs. J. & H. Reid & Nephew.]

IN THE ESTATE OF THE LATE HENRY A. FAGAN. { 1894. Jan. 23rd.

Mr. Graham applied for a further period of twelve months to the executrix testamentary to enable her to file a full account of her administration and distribution of the said estate.

The Court made no order, but directed that the matter should be referred to the Master, which ought to have been done before applying to the Supreme Court.

BAYLY V. BAYLY. { 1894. Jan. 23rd.

Mr. McLachlan moved on behalf of the petitioner, Mary E. Bayly, for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

The petition set forth that the parties were married at Port Elizabeth in March, 1878, that the issue of the marriage was two daughters, aged fourteen and eight respectively, that petitioner's husband deserted her in 1891 and went to Kimberley, that a summons had been issued and an attempt made to serve it upon him in Kimberley, and that the Sheriff at Kimberley had replied that the defendant had gone to Vryburg, wherefore she prayed for leave to sue by edictal citation.

It appeared that the Sheriff at Kimberley had not sent down a formal report, and the Court directed the matter to stand over, as it was quite possible that personal service or service at respondent's last known place of residence might since have been effected at Kimberley.

Re CAPE OF GOOD HOPE BANK. { 1894. Jan. 23rd.

Mr. Searle, Q.C., moved for authority to the official liquidators to enter into certain compromise proposed to be effected in respect of a debt due by the late Captain Findlay without the usual notification thereof in the newspapers, and for the sanction of the Court to such compromise.

It appeared that Captain Findlay was indebted to the bank for a certain letter of guarantee signed by himself and others. He had offered £154 in settlement of the bank's claim on himself, and the official liquidators considered the offer a fair and reasonable one under the circumstances.

The order was granted.

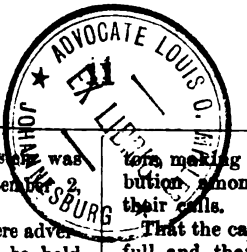
Ex parte GARLICK AND RUDDLE. { 1894. Jan. 23rd.

Insolvency—Trustee—Proof of debt.

Where no creditors had appeared at the first or second meeting in an insolvent estate and no trustee was elected, the Court on the petition of certain creditors, authorized them to call a meeting for the proof of their debts and the election of a trustee on condition that they paid all expenses in connection with the meeting and election.

Petition of John Garlick and Henry John Ruddle, carrying on business at Port Elizabeth and Kimberley under the style or firm of Garlick & Ruddle.

The petitioners alleged that they were creditors in the insolvent estate of Harris Kelman and George Bernstein, lately carrying on business in Griqualand West, but now residing in Calvinia, under the style or firm of Kelman & Bernstein, shopkeepers, in the sum of £904 0s. 5d., for goods sold and delivered at Kimberley, and interest during the period between January 31 and May 31 1892.



That the estate of Kelman & Bernstein was placed under sequestration on September 2, 1893.

That the first and second meetings were advertised on the 4th September, 1893, to be held before the Resident Magistrate of Calvinia, on the 13th September and on 20th September 1893, respectively. No creditors appeared at either of the meetings, no debts were proved, and no trustee was elected.

The petitioners stated that they did not appear, inasmuch as they understood and believed that they had an absolute cession of a fire, policy upon property which had been destroyed by fire, which would cover the whole amount of their claim.

That subsequently, on looking into the matter, they ascertained that they had in truth and in fact no cession.

The property insured had been destroyed by fire, and the insurance company refused to pay the claim on the ground that the firm of Kelman & Bernstein had no safe for the custody of their books, and they alleged that they had insured on the condition that the said firm would procure a safe at once.

That the petitioners were desirous of proving their claim, but no provision was made by the law for calling a special meeting under the peculiar circumstances, seeing that no trustee had been elected at the second meeting, and no claim had been porved.

The petitioners were also desirous of having John Garlick elected trustee.

The prayer was that the Court might be pleased to authorise the Master to call a meeting for the purpose of proving petitioners' debt and electing a trustee, or that the Court might make such other order as might seem meet.

Mr. Sheil was heard in support of the petition.

The Court granted the order as prayed. All expenses in connection with the calling of the meeting and the election of the trustee to be paid by the petitioners.

[Petitioners' Attorneys, Messrs. Van Zyl & Buissinné.]

Re THE CAPE STOCK FARMING COMPANY, IN LIQUIDATION. { 1894. Jan. 23rd.

Mr. Sheil presented the final report of the official liquidator in the above company.

The report set forth that all the liabilities of the company in this country and in England had been discharged.

That there was a balance of £50 8s. 11d., in the Colonial liquidator's hands and a balance of £175 0s. 7d. in the hands of the English liquidators, making a total of £225 9s. 6d. for distribution amongst shareholders who had paid their calls.

That the calls on 933 shares had been paid in full, and that a refund of 4s. 10d. per share would be payable to shareholders who had paid their calls in fall.

That the company had been wound up, and that beyond the amount above referred to for distribution amongst shareholders, there were no other assets belonging to the company in the hands of the Colonial or English liquidators.

The liquidator asked the Court:

1. To sanction the payment of 4s. 10d. per share as aforesaid.

2. To direct that the company be dissolved, and how the books, accounts, and documents of the company and of the liquidator should be disposed of.

3. That the liquidator might be discharged from his trust.

The Court granted prayers 1 and 2, and directed the books, accounts, and documents to be destroyed six months after the date of the present order.

The Chief Justice remarked that there was no necessity to give an order on prayer 3, as the release of the liquidator would follow as a matter of course on the dissolution of the company.

[Before Mr. Justice UPINGTON K.C.M.G.]

Re THE MINORS LARKIN. { 1894. Jan. 23rd.

Mr. Graham moved on behalf of the mother for authority to the Master to pay out of money to the credit of the said minors in the Guardians' Fund a monthly allowance in aid of their education and maintenance.

It appeared that the amount remaining to the credit of each of the minors in the Guardians' Fund was only £94 4s. 7d., that the mother was not in a position to pay the expenses of her children's education herself, and that if no allowance could be obtained the children would have to go out to service.

Mr. Justice Upington said he would not consent to the whole of the fund being used, and granted the order for one year only.

WAGNER V. WAGNER. { 1894. Jan. 23rd.

Mr. Graham moved on behalf of the petitioner, Mary Wagner, residing at Worcester, for an order or interdict to restrain her husband from

selling and disposing of their joint property, pending the result of an action for divorce, brought by her against her husband.

The petition stated that the petitioner was married in community of property to her husband, and that on the 16th January, 1894, she had caused a summons to be issued against him for divorce, on account of alleged adultery. The summons had been served on the defendant, and petitioner did not believe he would defend the action, but would allow judgment to go against him by default. The petitioner alleged that since that time her husband had been squandering their joint property by selling goods at below cost price, spending his time in an hotel, driving about in hired carts, and that he had expressed his intention of selling up everything and leaving.

Mr. Justice Upington said that notice ought to have been given of such an important application. If the order was granted, it meant the ruin of the defendant's business, and it was quite possible that the charges of adultery could not be substantiated. Due notice must be given, and in the meantime, if anything occurred to justify strong action, application could be made to a judge in chambers.

SUPREME COURT.

(IN CHAMBERS.)

[Before Mr. Justice UPINGTON, K.C.M.G.]

*KOCK V. MAIR. { 1894. Jan. 30th.

This was an application on notice in terms of the applicant's petition. The petitioner alleged that in the year 1885 he found himself in pecuniary difficulties, and approached his creditors with a view of affecting a compromise to save his estate, which consisted mostly of landed property, from sequestration; that on the 24th February, 1885, he effected a compromise with certain of his creditors, to whom he was indebted in the sum of £3,826 0s. 1d.; that in terms of the compromise his creditors undertook to stay all proceedings against him, provided he granted an irrevocable power of attorney to Messrs. James Hossack, in his capacity as general manager of the South African Loan, Mortgage, and Mercantile Agency (Limited), and Johannes Jacob Daniel Buyskes, in his capacity as secretary to the Western Province Administration and Trust Company, or the secretary for the time being of the said company, to sell forthwith for the best prices obtainable the whole of his estate and effects, movable and immovable, wherever situated, either by private sale or public auction, as might be found necessary, to pay his creditors. The petitioner alleged that he granted the said power of attorney, in which the following paragraph occurred: "The appearer further declared to authorise and empower the said attorney and agents upon the receipt of the purchase amounts aforesaid, or any part thereof, to apply the same to the liquidation and payment of those sums of money in which he on this day's date justly and lawfully stands indebted." All the creditors to the said compromise agreed to and signed the agreement at the foot of the said power of attorney. That under the powers conferred on them the parties appointed entered on the trust, and proceeded to realise the said property, and also to receive the hire or rent of the several houses remaining unsold, amounting in all to £1,793 19s. 11d. That the only property remaining were certain houses in Woodstock which had been advertised for sale; that the petitioner had requested the respondent to withdraw the sale to enable petitioner's attorney to investigate the account and to ascertain the amount of liabilities, if any were due; that the petitioner was about to institute an action for an account against the respondent's company, and to have the true intent and meaning of the deed of assignment defined.

The prayer was for an order restraining the sale of the property.

Mr. Searle, Q.C., was heard in support of the application; Mr. Graham for the respondent.

The Court refused the application with costs.

* The facts are fully stated in the report of the case heard on the 7th and 8th March, 1894. *Rep.*

BAYLY V. BAYLY.

Mr. McLachlan applied on behalf of petitioner for leave to sue by edictal citation, in an action for restitution of conjugal rights.

The Court granted leave to sue by the edict, personal service to be effected if possible, failing which one publication in the "Bechuanaland News" and one in the "Government Gazette," the citation to be returnable on February 15.

Re THE MINORS LARKIN.

In this matter, which was before the Court on Tuesday last, the Master was authorised to pay £2 per month for each of the minors for a period of two years, to be applied to their education.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

VILJOEN'S TRUSTEES V. VILJOEN AND OTHERS. } 1894. Feb. 1st.

Mr. Webber moved for judgment, under rule 329, for interest at 6 per cent. per annum on a mortgage bond for £600 from 5th May, 1893, less £4 6s. paid on account.

Granted.

LAWRENCE V. LOTTER.

Mr. Maskew said in this case defendant was sued upon a dishonoured cheque for £24 4s. The capital and interest had been paid, and judgment was now claimed for costs of suit, less £2 15s. 6d. paid on account.

Granted.

LONGWORTH AND CO. V. MORTON.

Mr. Webber applied for judgment under rule 329, for £102 7s. 7d. for goods sold and delivered.

Granted.

WOLFF'S EXECUTOR V. NESER. } 1894. Feb. 1st

Application for judgment under rule 329 (*d*) for delivery of 420 well-bred merino ewes in terms of a certain contract dated 24th November, 1892, signed by the defendant, whereby he hired certain 420 merino ewes, and undertook at the end of a year to return ewes of a like kind and age, or failing such delivery, the plaintiff claimed payment of the sum of £252, being the value of the said ewes, as stated in the contract.

2. Payment of the sum of £52 10s., being the rent due for the hire of the said ewes, reckoned from the first day of May, 1892, to the 31st December, 1893.

Mr. Sheil appeared for the plaintiff.

The Court granted judgment as prayed.

REHABILITATION.

On the motion of Mr. Castens, Charles Chowles was granted his rehabilitation.

TRIAL CASES.

OLIVER V. OLIVER.

This was an action for restitution of conjugal rights, failing which for divorce, on the grounds of the defendant's malicious desertion.

The declaration alleged that the parties were married in community on the 25th May, 1876, and that thereafter, on or about the month of January, 1891, the defendant wrongfully and maliciously deserted the plaintiff.

The prayer was for:

(*a*) A decree of restitution of conjugal rights failing which for divorce.

(*b*) Division of the joint estate.

(*c*) Costs of suit.

Mr. Norman Lacy produced the original marriage certificate.

Edith Agusta Oliver deposed: My husband and I lived together two or three months after our marriage; then my husband went up-country. We have not lived together for six years. On one occasion he went up to Kimberley, and I had to sell my furniture to get him back. Shortly after his return, he was sentenced to three years' imprisonment for indecent assault. It is now three years since he came out of prison. He has done nothing to support me. I offered to return to him if he would give me a home. He does not recognise me. He will come in for about £300 or £400 at his mother's death.

The Court granted a decree of restitution of conjugal rights with costs, defendant to return to plaintiff on or before 15th February, failing which, a rule *nisi* would be granted calling upon defendant to show cause by 28th February why a decree of divorce should not be granted with costs, and a division of the property held in community should not be effected.

GENERAL MOTIONS.

MAKALELA V. MAKALELA.

Mr. Tredgold applied for a rule *nisi* requiring respondent to show cause why applicant, his wife, shall not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

The Court granted the rule, which must be served personally, and was made returnable on the first day of next term.

DIXON V. DIXON.

Mr. Graham asked the Court to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to her husband of his conjugal rights, and for an order declaring that respondent had forfeited her rights under the marriage settlement.

The Court made the order.

WASSERFALL V. WASSERFALL.

Mr. Sheil moved to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights.

Granted.

GLAESER'S EXECUTORS V. QUIN.

This was an application for authority to the Sheriff to attach and sell, in execution of the judgment of this Court in the suit between the parties, the interest accruing to the respondent out of the joint estate of herself and her deceased husband.

Mr. Graham was heard in support of the application.

Mr. Joubert for the respondent.

The Court granted the order as prayed, but suspended execution pending payment of the sum of 30s. per month, the first payment to be made on the second day of March next.

SHOEBEL'S EXECUTRIX V. VAN ROOYEN.

This was an application to make absolute the rule *nisi* interdicting the respondent from transferring certain part of the farm Gansevley, situate in the division of Knysna, pending an action to be brought forthwith by applicant for transfer of the property.

Mr. Molteno was heard in support of the application.

Mr. Searle, Q.C., for the respondent.

The application for an interdict was refused, and the matter ordered to stand over for six months, during which time an action could be brought by the applicant or by the trustee, when the question of costs would be considered.

Re ESTATE DONALD MCKAY.

Mr. Currey moved to make absolute the rule *nisi*, issued under the Titles Registration and Derelict Lands Act, for transfer to the said estate of certain lot of ground with a cottage thereon, situate in McKinnon-street, King William's Town, at present registered under the name of John Birt.

Granted.

PETITION OF JOHANNES WESSELS.

Mr. Watermeyer asked the Court to make absolute the rule *nisi* for transfer to petitioner, under the Titles Registration and Derelict Lands Act, of certain portion of the farm Over de Berg, in the district of Robertson, purchased by petitioner in 1872, but never transferred, being still registered in the name of Jacobus S. Naudé, who died insolvent about eight years ago, leaving no estate.

Granted.

IN THE ESTATE OF THE LATE EDWARD DOBSON.

Mr. Sheil moved for authority to the Master of the Supreme Court to pay out to the executors of the said estate balance in his hands of £10 5s. 1d., arising from the sale in execution of certain lot of ground at Rufane Vale, Port Elizabeth, mortgaged by the owner thereof, Matthys R. P. J. Snyman, to the said Edward Dobson for £150, but the bond being lost or mislaid.

Granted.

DU PLESSIS V. DU PLESSIS.

Mr. Searle, Q.C., moved to make absolute the rule *nisi* for the dissolution of the marriage subsisting between the parties, by reason of the respondent's failure to obey the order for restitution to her husband of his conjugal rights. Counsel read a letter written on behalf of plaintiff to his wife, asking her to come back, commencing "Madam," and couched throughout in terms which were anything but affectionate.

The Chief Justice, while making the order, said that parties ought to satisfy the Court that some *bona-fide* attempt has been made to induce defendant to come back, and the letter which had been read in the present case was not the sort of communication to induce the wife to return. As there was, however, other evidence to show that the defendant did not intend to return, the rule would be made absolute.

SMITH V. BROAD. } 1894. Feb. 1st.

This was an application on notice by the *curator bonis* in the estate of the late Roberts calling upon the defendant to show cause why (*a*) the permission granted him by the Supreme Court on 12th October, 1893, to bring an action against the applicant should not be revoked, and why he should not be barred from bringing such action; (*b*) why he should not be ordered to quit and give up possession of the farm Grassridge No. 2, of the Balmoral estate, now occupied by him; and (*c*) why he should not be ordered to pay the costs of a certain application heard in the Supreme Court on the 12th October, 1893, in which he was the respondent and the above applicant was the applicant.

The respondent filed an affidavit, in which he alleged that immediately after the order of the 12th October, 1893, he took steps to bring an action to set aside the interdict and for damages

but was advised that he had better wait until an executor had been appointed in the estate of the late Frederick Bertie Worsley Roberts.

That on the 13th December last he was informed that executors had been appointed, and immediately on receipt of this information, having further claims against Roberts's estate, he stated cases for the opinion of counsel, and that before the last opinion was received he was served with the present notice.

That he was advised he had a good cause of action against Roberts's estate, and that it was his intention to commence an action forthwith and bring the same for trial in the Uitenhage Circuit Court on the 6th March next.

That on receipt of the present notice of motion he at once came from Uitenhage to Cape Town at great expense and personal inconvenience in order to facilitate and expedite the bringing of his action, and to prevent the same from being thrown over the ensuing Circuit Court at Uitenhage.

That since his arrival in Cape Town he had obtained an order giving him leave to consolidate his actions and to make the present applicant a co-defendant with the executrix testamentary.

That his instructions to settle declaration were in the hands of counsel, and that his summons and declaration would be ready for service in a day or two.

Lastly, he said that since he had been informed of the appointment of the executrix testamentary, he had done everything in his power to shape and formulate his claims against the estate of the late Mr. Roberts, and up to the present time he had done everything that could be done to prosecute the same with the greatest diligence.

Mr. Searle, Q.C., was heard in support of the application.

Mr. Sheil appeared for the respondent.

The Court made no order on the application, but directed the respondent to forthwith bring his action in the Supreme Court. Costs to be costs in the cause.

[Applicant's Attorneys, Messrs. Van Zyl and Buissinné; Respondent's Attorney, C. Broad.]

CURREY V. INCORPORATED LAW SOCIETY.—INCORPORATED LAW SOCIETY V. PHEAR. } 1894. Feb. 1st.

Attorney—Professional Misconduct.

An attorney, practising in the High Court of Griqualand, having been requested by the Judges of that Court, by means of a letter addressed to him by the Registrar, to explain certain statements made by him in an affidavit in a pending case which the Judges had reason to believe were incorrect, and having been further told that if such explanation were not given further proceedings would be taken against him, answered, in effect, that he would not give any explanation by letter, but that he would reserve anything he had to say till proceedings were taken, when he would have an opportunity of making his defence on oath.

It was proved to the satisfaction of the Supreme Court that the incorrectness of the statements were caused by a mistake in a telegram received by the attorney.

Held, *that there was no ground for a charge of professional misconduct against him.*

These two matters were heard together.

The first was an application on notice that on the hearing of the second application Mr. John Blades Currey would intervene and apply to be heard before this Honourable Court, and that he would pray that the costs of this appearance might be paid by the applicants (the Law Society)

The second application was on notice that application would be made to the Court requiring the respondent (Phear) to show cause, if any, why he should not be struck off the roll of attorneys and notaries, or why such other punishment should not be inflicted upon him as to the Court might seem meet, on the ground that he, being an attorney, and as such also an officer of the High Court of Griqualand West, was guilty of professional misconduct in having treated with contempt, and having declined, without lawful cause or excuse, to give the information asked of him, or to answer the request made to him by the judges of the High Court of Griqualand West through the Registrar of that Court in certain letters, dated respectively 30th September and 5th and 19th October, 1893, as to whether when he, as the attorney for the London and South African Exploration Company, presented their petition to the High Court on the 14th September, 1893, he was or was not aware that his clients, the said company, had presented or intended to present a petition to the Chancery Division of the High Court of Justice, England, for the winding-up of the North-Eastern Bultfontein Company. And that he would also be required to show cause why he should not be ordered to pay the costs of this application.

The facts are briefly these. On the 27th September last the "Diamond-fields Advertiser"

drew attention to a certain notice which had appeared on the 30th August in the London "Daily Telegraph," to the effect that a petition for the winding-up of the North-Eastern Bultfontein Company was on the 25th August, 1898, presented to the High Court of Justice by the L. and S.A. Exploration Company, and that the said petition was directed to be heard on the 25th October, 1893. The "D.F. Advertiser" remarked that it had been pointed out to them that this notice was by no means consistent with certain allegations contained in a petition filed by the L. and S.A. Exploration Company in connection with proceedings for the winding-up of the North-Eastern Bultfontein before the High Court on the 14th September.

In the petition just referred to, the following paragraph appeared:

6. Your petitioners believe that the property of the company is a valuable property, of far greater value than would be required to satisfy the debts of the company, but that if the works of the company were closed down, and its operations brought to a standstill, its assets would be materially reduced in value to the great loss and damage of all concerned.

The remarks of the "Diamond-fields Advertiser" having been brought to the attention of the judges of the High Court, the Registrar, on the 30th September, wrote to Mr. Phear telling him that the above statements had come under the observation of the judges of the High Court. That their lordships were not aware whether these statements were correct, or whether, if so, the facts therein set forth were within Mr. Phear's knowledge or that of his clients, the L. and S.A. Exploration Company, when the petition was presented to the Court on the 14th September, but that the matter was one of which they thought, for obvious reasons, that an opportunity should be afforded Mr. Phear of tendering any explanation which he might desire to offer.

To this Mr. Phear replied, and in the course of his letter remarked as follows: "For myself I would reply that the reasons referred to by you as obvious for calling on me for an explanation are not so to me, as I am unaware of any conduct on my part which requires explanation."

Further correspondence followed, Mr. Phear repudiating the charges and taking up the position that the specific charges brought against him should be advanced in a formal manner, so that he might have an opportunity of substantiating his case and definitely clearing himself from the charges brought against him.

Finally, on the 19th October, the Registrar wrote to Mr. Phear telling him that he had been instructed to request him to be good enough to state explicitly whether, when the petition of the 14th September was presented to the Court, he was or was not aware that his clients had presented or intended to present a petition to the Chancery Division of the High Court in England for the winding-up of the North-Eastern Bultfontein Company.

To this letter Mr. Phear replied that he preferred to reserve any statement that he might have to make until the occasion of the further proceedings which he gathered the Court shortly intended to take, when any such statement could be formally made on oath.

The matter was then referred to the Law Society.

At a meeting of that body to consider the matter, great conflict of opinion existed as to whether the society should move in the matter, and it was only on the casting vote of the chairman that the present proceedings were taken.

The respondent filed an affidavit, in which he justified his conduct in reserving his explanation mainly on the grounds of certain remarks alleged to have been made by the Judge-President publicly in Chambers on the 19th October last.

He explained that with regard to the petition of the 14th September that it was believed by him and by his clients at the time of the hearing of the petition that the London petition was presented by the debenture-holders of the North-Eastern Bultfontein Company, this belief arising from a mistake in the cablegram (which he saw and discussed with his clients), giving the information as to the presentation of a petition in London, and that he first learnt that the petition had been presented by the London and South African Exploration Company after the arrival in Kimberley of documents which came by the English mail reaching Kimberley on the 24th September.

Mr. Currey also filed an affidavit, in which he corroborated Mr. Phear's statement as to their belief that the London petition had been presented by the debenture-holders, and also pointed out how the mistake had occurred in the cablegram.

Mr. Sheil appeared for the Incorporated Law Society.

He explained that the Society did not take up a hostile position against Mr. Phear. The matter having been brought to the notice of the Law Society by the Judges of the High Court, that body was justified in bringing it to the notice of the Supreme Court.

The Law Society had no desire to have Mr. Phear struck off the roll. The application was in terms of section 22 of Act 27 of 1883, and the matter was left entirely in the hands of the Court.

Mr. Phear had not been asked for an explanation before the present proceedings were taken, because the society naturally concluded that as Mr. Phear had declined to give the judges of the High Court an explanation, he would not have altered his position at the request of the Law Society.

Mr. Rose-Innes, Q.C., for the respondent, Phear.

Mr. Searle, Q.C., for the intervener, Mr. J. B. Currey.

The Court refused the application with costs.

The Chief Justice said: If the respondent has been guilty of contempt of Court the High Court of Griqualand can deal with him. In that case the proper course would be to charge him with the offence in open court, and after he has had an opportunity of meeting the charge, to pronounce such judgment as the evidence warrants. But the charge now made in this Court is a still more serious one. We are asked to strike this man off the rolls by reason of his professional misconduct. In what did this misconduct consist? A letter was sent to him by the Registrar of the High Court on the 30th September 1893, in the following terms: "Certain statements, which appeared in the Diamond-field Advertiser, of September 27 have come under the observation of the Judges of the High Court. Their lordships are not aware whether these statements are correct, or whether, if so, the facts therein set forth were within your knowledge, or that of your clients, when their petition was presented to the Court on the 14th inst., but the matter is one of which they think for obvious reasons that an opportunity should be afforded to you of tendering any explanation which you may desire to offer." It is to be regretted that on receipt of that letter the respondent did not, with the courtesy due to the Court, give a full explanation of the mistake which had crept into the petition. The point was that he omitted therein to inform the Court that a petition for the winding-up of the Bultfontein Company had been presented by his clients to the High Court in England. This omission, it now appears, was occasioned by an error in a telegram which the respondent had received from England. If this explanation had been given in answer to the Registrar's letter I have no doubt that the Judges would have been satisfied. But the respondent appears either to have taken umbrage at the tone of the letter, or to have thought that he might commit himself in some way if he gave any explanation except in open court. He accordingly asked that definite charges should be made against him. Further correspondence ensued, from which it appears that the Judges did intend to take proceedings of some sort against him. His final answer was in effect that he would not give any explanation by letter, but that he would reserve anything he had to say until proceedings were taken, when he would have an opportunity of making his defence on oath. I am not prepared to say that, at that stage, it was an unreasonable position for the respondent to take up. When it became clear that the explanation was asked for with a view to further proceedings against him he was entitled to object to being questioned by a letter from the Registrar. The better course for the Court would have been to state in Court the points upon which information was required, and to give the respondent an opportunity of supplying that information on oath and in court. The learned Judges being dissatisfied with the respondent's conduct sent the papers in the case to the Incorporated Law Society, and that body now applies to the Court for an order striking the respondent off the rolls. The evidence does not in my opinion justify the charge of professional misconduct, and the application must be refused with costs.

Mr. Innes asked for the further expenses of Mr. Phear as a witness, as he had come specially from Kimberley.

The Chief Justice said the Court could have decided the case without Mr. Phear's presence, and would not grant his expenses as a witness. The other costs would be allowed.

As regarded Mr. Currey's application, it was out of the question that the Law Society should pay his costs. No charge had been or could be brought against Mr. Currey.

Mr. Sheil asked for costs of opposition against Mr. Currey, as the Law Society had to come to court to resist his claim for costs.

The Court made no order, being of opinion that no additional costs had been incurred.

Mr. Justice Buchanan concurred, and added that the explanation made by Mr. Phear in his affidavit was not only satisfactory to this Court, but had it been made to the Judge-President of the High Court, it would no doubt have been equally satisfactory.

Mr. Justice Upington said if he thought that Mr. Phear had knowledge of the fact that a petition had been presented in England for the winding-up of the company, when at the same time he was opposing the winding-up of that company at Kimberley—the grounds in the one case being that of insolvency, and in the other of solvency—he should have dealt very stringently with him. But he saw no proof whatever upon the evidence that he (Mr. Phear) was aware of such a thing.

[Attorneys for the Law Society, Messrs. Van Zyl & Buissinné; Attorneys for J. B. Currey,

Messrs. Fairbridge & Arderne; Attorney for the respondent Phear, D. Tennant, jn.]

In re LOURENS' INSOLVENT ESTATE.

Mr. Searle, Q.C., applied for a rule *nisi* restraining the trustees in this estate from selling certain property. The sale was to take place to-morrow and the matter was of urgent moment.

The Court granted a rule *nisi* calling upon the trustee to show cause by 15th February why he should not be interdicted from selling, pending an action to be forthwith brought by applicant, the rule to operate meanwhile as an interdict and intimation of the same to be made by telegraph.

THERON v. WOOLF. { 1894. Feb. 2nd.

Magistrate's jurisdiction—Set-off—Exception.

T. *sued* W. *in a Magistrate's Court for* £13 17*s. being the balance of an original account of* £57 15*s.* 3d. *for work and labour done.*

Annexed to the summons was an account showing how the £13 17*s. was arrived at, namely, by deducting from the* £57 15*s.* 3d. *the following sums* : £30 (*advanced to carry on the work*), £6 18*s.* (*cash supplied*), *and* £7 0*s.* 3d. (*goods supplied*).

W *excepted to the summons on the grounds that the amount in dispute was beyond the Magistrate's jurisdiction.*

W *gave evidence and deposed that the item of* £30 *credited in the account annexed to the summons had nothing to do with the claim for work and labour done, and that that amount had been advanced by him to* T. *to enable the latter to buy land, and that he held* T.'s *promissory note for the amount.*

He denied T's *right to set off the amount of the promissory note against his claim for work and labour done.*

The Magistrate sustained the exception with costs.

Held on appeal, *that the Magistrate had jurisdiction, and that the case was governed by* Kruger v. Van Vuuren's Executrix (5 Juta, 162).

This was an appeal from a decision of the Assistant Resident Magistrate for the district of Albert in an action in which the present appellant (plaintiff) sued the respondent (defendant) for £13 17s., being the balance of an account for work and labour performed for and on behalf of the defendant.

The plaintiff annexed an account to the summons, from which it appeared that the amount sued for was arrived at by deducting from the total sum alleged to be due, namely £57 15s. 3d., the sum, of £30 (alleged to have been advanced by the defendant to the plaintiff to carry on the work), £6 18s. (cash supplied to the boys) and £7 0s. 3d. (goods supplied as per account rendered).

The defendant excepted to the summons on the grounds that the matter was beyond the jurisdiction of the Court.

Evidence was then taken and the defendant deposed:

I am the defendant, and I know the plaintiff. I produce the summons. Plaintiff claims £13 17s. balance of an account. The account shows a credit of £30, which was cash I lent him to pay for some erven in Aliwal. That loan had nothing to do with the work which he had done for me. I produce a promissory note given me by plaintiff for this £30. I have never held this as a set-off against plaintiff. I do not admit Theron's right to set off this promissory note for any amount I owe him.

Cross-examined: I do occasionally lend money as a favour. Plaintiff was working for me and he asked me to lend him the money. I don't owe plaintiff any money even if he includes this £30. I told Hattingh plaintiff had overdrawn. I did not understand that the promissory note was to go off the work done by plaintiff. I had to pay him when he finished his work but he could draw on account.

Re-examined: I don't admit the set-off of £30.

By the Court: There are other items in the account which are incorrect and which I dispute.

The plaintiff wished to lead evidence to show that the amount of £30 was a liquidated amount, and that it was specially agreed that this amount should be set off in the account.

The Court refused to allow this evidence and upheld the exception with costs.

The following were the Assistant Resident Magistrate's reasons:

The defendant disputes the correctness of the whole account annexed to the summons, and therefore to try the case it would be necessary to inquire into every item in the account, which amounts to £57 15s. 3d. in all, thus placing the matter beyond the jurisdiction of this Court. *Vide* cases of *Charsley* v. *Horsley* (3 E.D.C., 433) and *Mathews* v. *Stanton* (4 C.L.J., 233).

The plaintiff now appealed.

Mr. Graham was heard in support of the appeal, and contended that the Magistrate erred in allowing the exception, as *Kruger* v. *Van Vuuren's Executrix* (5 Juta, 162) was directly in point.

Mr. Sheil for the respondent:

The Magistrate was correct in holding that he had no jurisdiction. The Magistrate found as a fact on the evidence that the set-off of £30 was not due by the defendant.

Clearly the £30 for which credit was given could not be set off, it was in dispute.

The case of *Kruger* v. *Van Vuuren's Executrix* has really no application to the present case, because the £13 9s. 6d. in *Kruger's case* was practically admitted, and it was held by the Court to have operated as an extinguishment *pro tanto* of the plaintiff's claim.

In the present case the £30 set off was disputed the defendant swore that he had never advanced the plaintiff £30 to go on with the work. He admitted, however, that he had lent the plaintiff £30 to purchase erven in Aliwal North, for which advance he received the plaintiff's promissory note which was produced.

It is clear from the dates in the account that the promissory note must have been given for something else besides the work done, as there was no occasion to give a promissory note for £30 when the greater part of the money represented by the promissory note had already been earned.

The Court allowed the appeal.

The Chief Justice said: This case is governed by the decision of the Court in the case of *Kruger* v. *Van Vuuren's Executrix*. I have very little to add to what was said in that case. The plaintiff attaches to his summons an account showing £57 15s. 3d. as being originally due to him. Now it is quite clear that this amount was beyond the Magistrate's jurisdiction, but attached to this account is a claim which the defendant had against the plaintiff and which shows, amongst other items, that a sum of £30 is owing by the plaintiff to the defendant. Now it was not denied by the defendant that that amount was claimable by him from the plaintiff. He admitted that he held a promissory note for the amount, and all he said was, "I deny your right to set off the amount of the promissory note." Now I am of opinion that this is a legal set-off, more especially as the defendant had taken the promissory note for the amount of the debt. The plaintiff's claim was reduced to an amount under £20 and that was within the Magistrate's jurisdiction, therefore the Magistrate was wrong in holding that he had no jurisdiction. If the case of *Kruger* v. *Van Vuuren's Executrix* had been before the Magistrate I am confident that he would have arrived at a different decision. The appeal must therefore be allowed, with costs of appeal, and the case remitted to the Magistrate to be tried on its merits.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery Walker; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

WILHELM v. BEAMISH. { 1894. Feb. 2nd.

Slander—Defamatory words spoken in anger —Absence of provocation.

In the absence of provocation it is no defence to an action for slander that the defamatory words complained of were spoken in anger.

This was an appeal from a decision of the Resident Magistrate for Albert in an action in which the present respondent (plaintiff in the Court below) sued the appellant (defendant) for £20 damages for slander.

The summons alleged that the defendant did on the 29th day of November, 1893, and in the office of Mr. Henry Hardwicke Andrews at Burghersdorp, speak and publish of and concerning the plaintiff the following malicious and defamatory words, viz.: "You are a liar and you are a rogue," and that by these means the plaintiff had sustained damage in the sum of £20, for which amount the plaintiff prayed judgment.

The defendant excepted to the summons on the grounds that the alleged defamatory words were spoken *in ira*, in the heat of the moment, without malice, and disclosed no cause of action. The Court reserved the point as to whether the words were *per se* actionable.

It appeared from the evidence that Mr Andrew had been instructed by Messrs. Fehr & Co. (whose bookkeeper the plaintiff is) to collect an account of 13s. 6d. from the defendant. The defendant alleged that he had a contra account against Fehr & Co. but which appeared in the books of that firm as having been paid.

The plaintiff, on the day on which the words complained of were spoken, took his firm's cash book to Mr. Andrew's office and there met the defendant and said to him, "My good man, we have paid you" at the same time showing him the entry in the cash book. Defendant denied that he had been paid, lost his temper, and made use of the words complained of.

The defendant's evidence went to show that he did not believe that his account had been paid, that he lost his temper, and in the heat of the moment used the words complained of,

There was also evidence to show that the defendant had tendered an apology to the plaintiff, but only after he had received the demand.

The Magistrate gave judgment for the plaintiff for £1 with costs, the following being his reasons:

"In this case there does not appear to have been a quarrel but defendant went to Mr. Andrew's office, as he himself admits, in a bad temper and made use of the language imputed, and plaintiff left the office. Defendant admits that that afternoon he knew he had acted wrongly, but did not try to make amends until he received the demand, but although he appears to have made some sort of an attempt then, still at the trial he almost reiterates the very words complained of."

The defendant now appealed.

Mr. Rose-Innes, Q.C., was heard in support of the appeal. He contended that there was entire absence of evidence of *animus injuriandi* which was the essence of an action for slander.

The cause of the *rixa* was extreme passion and this rebutted any presumption of *animus*.

Actions of this kind should not be encouraged.

The judgment was not in accordance with substantial justice.

He cited and discussed the following authorities, *Powel* v. *Price* (1 Menz, 500)., *Woolf* v. *Van Hellings* (1 Menz., 529); *Botha* v. *Brink* (8 Buch. 118) and *Voet* (47, 10, 1).

Mr. Graham, for the respondent, referred to *Odgers on Libel and Slander*, p. 276, and the passagefrom *Voet* above referred to.

Mr. Rose-Innes, Q.C., in reply.

The Court dismissed the appeal.

The Chief Justice said: It is to be regretted that this action was brought at all in the Magistrate's Court, because the words were not so defamatory that the plaintiff could have lost much in credit or in reputation. Still, the words were used, and if they were actionable the plaintiff was justified in coming to the Court to claim damages. The Magistrate came to the conclusion that the words were defamatory and that the plaintiff was entitled to some damages and he gave judgment for £1 with costs. The defendant might very well have been satisfied with that judgment, but he was not, and he has thought well to appeal. Now the defendant can only succeed if the Magistrate erred in law or in fact. The Magistrate has not erred in either. It was now contended that defendant was in such a state of mind that he was not responsible for what he said, and a passage from *Voet* has been quoted to show that a person in that condition of mind was in the same position as an insane person who was not aware of what he was doing. If the defendant was in such a state of anger there ought to have been some evidence of provocation—some proof that he was in that condition when he used the words complained of. I should hesitate to believe that the man was in that state unless he was either mad or had received provocation. In this case it was not alleged that he was mad or that he had received provocation. At any rate there was not such provocation as to justify him in using the words, "You're a rogue; you're a liar." Under these circumstances I am of opinion that the appeal ought to be dismissed, with costs.

Their lordships concurred.

[Appellants Attorney, G. Montgomery-Walker. Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

WOODHEAD, PLANT AND CO. v. GUNN. { 1894. Feb. 2nd.

Vindicatio — Stolen money — Bank note — Negotiable instrument — Market-overt — Judicial sale.

A person from whom money has been stolen is not entitled to recover it back from another who has bona-fide *received it for value.*

The same rule applies to any negotiable instrument which has been placed in such a state that the maker can be sued thereon by any bona-fide *holder and which is by commercial usage treated as cash.*

A Bank of England note for £5 having been stolen from the plaintiff he prosecuted the thief to conviction, and thereafter brought an action to recover the note or its value from the defendant, a merchant, who in the ordinary course of business had bona fide *received the note as cash and for value from the thief.*

Held, *reversing the judgment of the Magistrate, that the plaintiff was not entitled to succeed.*

Questions of market-overt and judicial sales discussed, and the cases of Van der Merwe v. Webb (3 E.D.C. 97). Retief v. Hammerschlag (1 Kotze's Rep., 198); and Lange v. Liesching (Foord's Rep., 55) *commented upon.*

This was an appeal from a decision of the Resident Magistrate of Cape Town in an action in which the present respondent, plaintiff in the

Court below, sued the appellants (defendants) for restoration of a £5 Bank of England note or its value.

The facts stated in the nature of a special case for the decision of the Magistrate are as follows:

1. The plaintiff is a clerk residing in, and the defendants are importers and merchants carrying on business at Cape Town.

2. On or about the 27th day of November, 1893, one Charles Martin stole from the plaintiff a certain Bank of England note (copy of which is hereunto annexed). The said Charles Martin has been duly tried, convicted, and sentenced for the said theft.

3. On or about the 27th day of November, 1893, the defendants, in good faith and in the ordinary course of business, and in ignorance of such theft, received the said bank note from the said Charles Martin, and gave him full value therefor, to wit, goods to the value of five shillings and change in cash to the amount of £4 15s.

4. It is not the practice of bankers in this city to treat a Bank of England note as a legal tender.

5. The plaintiff claims that the said note be restored to him by the defendants, or that they be adjudged to pay him the sum of £5 sterling, being the value thereof, with costs of suit.

6. The defendants contend that the plaintiff's claim is bad in law, and that it be dismissed with costs.

The Magistrate gave judgment in favour of the plaintiff for delivery of the note or payment of £5, its value, the following being his reasons:

Plaintiff sues defendants for restoration of a £5 Bank of England note or payment of its value, £5. This note, it is admitted, was stolen on or about the 27th November by one Charles Martin, who was duly convicted and sentenced for the said offence. That on or about the same day, 27th November, the defendants, in good faith, and in the ordinary course of business, and ignorant of such theft, received the said bank note from the said Charles Martin, and gave him full value therefor. I have to deal with the recovery of stolen property, which the plaintiff, the original lawful owner of the bank note, demands from the defendants. Several authorities have been quoted in support of the defendants' case, but they are mostly English authorities, and I cannot find that they are applicable in this case. This Court has to deal with the law of the Colony as at present in force, and no better case in support of the general principle to be observed in cases of this nature can be found than the case of *Van der Merwe* v. *Webb* (3 E.D.C., p. 97). It is there clearly laid down that stolen property can be recovered by the lawful original owner, wherever it is found, even if it was sold in market-overt. I lay aside all question of hardship to the *bona-fide* holders, Messrs. Woodhead & Plant, and confine myself to the clear principle of law, that any person who has unlawfully been deprived of his own property can follow it up into the hands of any other person, no matter whether such person has come by it *bona fide* or not. Judgment for plaintiff for delivery of the note or payment of £5, its value, with costs of suit.

From this judgment the defendants now appealed.

Mr. Sheil in support of the appeal.

The Magistrate in the Court below, in deciding against the defendants, appears to have relied solely on the decision of the Eastern Districts Court in the case of *Van der Merwe* v. *Webb* (3 E.D.C., 97) but in the appeal from his judgment it will be unnecessary to inquire whether the law as laid down in *Van der Merwe* v. *Webb* is correct, or whether the view of the High Court of the Transvaal in *Retief* v. *Hammesschlag*, dissenting from the judgment in *Van der Merwe* v. *Webb*, is the more correct, because in the present case we have not to deal with the sale of an ordinary chattel in market-overt, but with the rights of a *bona-fide* holder for value of a negotiable instrument, of a holder who took a bank note in the ordinary course of business, and who was ignorant of any defect in the title of the person from whom he received it.

In other words, the question to be decided in this case is whether the doctrine of the Civil law that the owner of property can follow it, and reclaim it from a *bona-fide* possessor, applies in this country to negotiable instruments which have been taken *bona fide* and for value by a merchant in the ordinary course of trade.

In the jurisprudence of all commercial countries in the world, including that of Holland, negotiable instruments are placed on a different footing to that of ordinary property. *Van der Linden* (Inst. 4, 7, 1); *Van der Keessel* (Th., 525).

So that in a question of this kind, affecting as it does the commerce of the world, the Municipal law should not be so much regarded as the laws of the great commercial countries of the world.

If this is so then the present case should be decided by the law of England, the great commercial country of the world, in whose capital the chief trade of the world is done, and by whose commercial laws, as distinct from her local customs, the custom of merchants and the mercantile law of the world are mainly governed.

Now it is clear by English law that where a person has taken a bank note *bona fide* and for

value in the ordinary course of business, and in ignorance of any defect in the title of the person from whom he took it, that note, if it has been stolen, cannot be followed up by the original owner.

This doctrine, first laid down in the case of *Miller* v. *Race*, (1 S.L.C, 526)., has never been questioned, but on the contrary it has in several subsequent cases been extended. And to the same effect is the American law and the Scotch law.

The Chief Justice: But even under our own law has the holder not a good title? *Van der Keessel* (Th. 525).

Mr. Sheil: I read *Van der Keessel* (Th. 525) as referring only to the rights of a *bona-fide* holder as against the maker, but the principle may well be extended.

If the note be regarded as money, which in reality it is, *Voet* (6, 1, 8) is conclusive. See also *York* v. *Van der Lingen* (1 Ros, 337).

The appeal should be allowed.

Mr. Graham for the respondent: The only exception to the rule that the owner of stolen property can follow it up and claim it even from the *bona-fide* possessor is in the case of money, *Voet* (6. 1, 8).

The exception cannot apply in the present case as an English bank note is not a legal tender in this country.

As to the English law with regard to the theft of bonds, see *Chichester* v. *Hill & Son* (15 Cox, 258).

The Magistrate's view of the law was correct.

Mr. Sheil in reply.

The Court allowed the appeal.

The Chief Justice said: The Magistrate has correctly stated the general principle of law to be that a person whose property has been stolen may follow it up into the hands of any other person, whether such other person has obtained it *bona fide* or not. It is a principle naturally flowing from the well-known rule that no one can transfer to another greater rights than he himself possesses. The owner is entitled to recover his stolen goods or their value from the thief, and therefore also from the person to whom the thief has sold or delivered them. The Roman law was fairly consistent in the application of the rule, but it admitted some exceptions. For instance, where money had been stolen and paid by the thief to his creditor, and had been mixed by such creditor with his own money so as not to be distinguishable, the owner lost his remedy against the creditor and could only proceed against the thief (*Dig.* 46, 3, 78). In the Dutch law it was no longer required that the stolen money should be undistinguishable. If a person has honestly received stolen money in payment of a debt, or of the price of anything sold by him, and has either spent the money or mixed it with other money, the former owner of the money cannot recover it from him, and the mixture of the money was deemed equivalent to spending it (*Voet* 6, 1, 8). An interesting case in point is reported by *Noestad* (Sup. C., Dec, 36). One Petrus had with violence robbed one Gerard of many thousands of florins, part of which he paid to his creditors, part he spent in the purchase of cattle, and the rest he retained. He was subsequently arrested, and sentenced to be burned to death. In the distribution of his assets, the question arose whether the creditors to whom part of the stolen money had been paid were liable for the amount to Gerard. On his behalf it was contended that the ownership in his money could not be transferred without his own act, and that even *bona-fide* possessors are bound to restore property forcibly taken from its owner. On behalf of the creditors, it was maintained that money stands on a different footing from other articles, and that where money is paid *bona fide* and for value the ownership passes to the receiver upon the money being mixed or spent. The Court of Holland by its judgment ordered the money to be repaid to Gerard, but on appeal this judgment was reversed by the Supreme Court. In those days the real nature of a currency was not clearly understood, but even then it was found to be impossible to place money on the same footing as ordinary articles of merchandise. At the present day—whatever disputes there might be among political economists as to the true definition and nature of a coin currency—every one is agreed that the currency of money is quite incompatible with the right of anyone to follow stolen money into the hands of others who have honestly received it for value, whether it has been mixed up with other money or not. In the case of *York* v. *Van der Lingen* (1 Ros., 337) it was held that when a thief expends stolen money in the purchase of articles it cannot be recovered back from the seller, unless it is proved that the latter knew it was stolen. In the present case it is not coin, but a Bank of England note which has been stolen. It was paid in the ordinary course of business to a merchant who, in ignorance of the theft, gave full value for the note. It was admitted on behalf of the defendant in the Court below that it is not the practice of bankers in Cape Town to treat Bank of England notes as a legal tender, but the admission does not, in my opinion, affect his right to the note. The value of the note does not consist in the material on which it is

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

VILJOEN'S TRUSTEES V. VILJOEN AND OTHERS. } 1894. Feb. 1st.

Mr. Webber moved for judgment, under rule 329, for interest at 6 per cent. per annum on a mortgage bond for £600 from 5th May, 1893, less £4 6s. paid on account.

Granted.

LAWRENCE V. LOTTER.

Mr. Maskew said in this case defendant was sued upon a dishonoured cheque for £24 4s. The capital and interest had been paid, and judgment was now claimed for costs of suit, less £2 15s. 6d. paid on account.

Granted.

LONGWORTH AND CO. V. MORTON.

Mr. Webber applied for judgment under rule 329. for £102 7s. 7d. for goods sold and delivered.

Granted.

WOLFF'S EXECUTOR V. NESER. } 1894. Feb. 1st

Application for judgment under rule 329 (*d*) for delivery of 420 well-bred merino ewes in terms of a certain contract dated 24th November, 1892, signed by the defendant, whereby he hired certain 420 merino ewes, and undertook at the end of a year to return ewes of a like kind and age, or failing such delivery, the plaintiff claimed payment of the sum of £252, being the value of the said ewes, as stated in the contract.

2. Payment of the sum of £52 10s., being the rent due for the hire of the said ewes, reckoned from the first day of May, 1892, to the 31st December, 1893.

Mr. Sheil appeared for the plaintiff.

The Court granted judgment as prayed.

REHABILITATION.

On the motion of Mr. Castens, Charles Chowles was granted his rehabilitation.

TRIAL CASES.

OLIVER V. OLIVER.

This was an action for restitution of conjugal rights, failing which for divorce, on the grounds of the defendant's malicious desertion.

The declaration alleged that the parties were married in community on the 25th May, 1876, and that thereafter, on or about the month of January, 1891, the defendant wrongfully and maliciously deserted the plaintiff.

The prayer was for:

(*a*) A decree of restitution of conjugal rights failing which for divorce.

(*b*) Division of the joint estate.

(*c*) Costs of suit.

Mr. Norman Lacy produced the original marriage certificate.

Edith Agusta Oliver deposed: My husband and I lived together two or three months after our marriage; then my husband went up-country. We have not lived together for six years. On one occasion he went up to Kimberley, and I had to sell my furniture to get him back. Shortly after his return, he was sentenced to three years' imprisonment for indecent assault. It is now three years since he came out of prison. He has done nothing to support me. I offered to return to him if he would give me a home. He does not recognise me. He will come in for about £300 or £400 at his mother's death.

The Court granted a decree of restitution of conjugal rights with costs, defendant to return to plaintiff on or before 15th February, failing which, a rule *nisi* would be granted calling upon defendant to show cause by 28th February why a decree of divorce should not be granted with costs, and a division of the property held in community should not be effected.

GENERAL MOTIONS.

MAKALELA V. MAKALELA.

Mr. Tredgold applied for a rule *nisi* requiring respondent to show cause why applicant, his wife, shall not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

The Court granted the rule, which must be served personally, and was made returnable on the first day of next term.

DIXON V. DIXON.

Mr. Graham asked the Court to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to her husband of his conjugal rights, and for an order declaring that respondent had forfeited her rights under the marriage settlement.

The Court made the order.

question to be determined in the latter case was whether the purchaser of stolen goods at a sale by public auction is bound to restore such goods to the owner without compensation, and this question was answered correctly, as I venture to think, in the affirmative. In both cases a Circuit Court decision of Mr. Justice Watermeyer (*Gericke* v. *Stander*) was mentioned as supporting the view that a Municipal market is equivalent in its legal effects to a Dutch free market. On reference, however, to the records of that case, I find that the only question at issue was whether, as a fact, certain cattle claimed by the plaintiff belonged to him or not. There had been no sale at a market, and the legal question as to the effect of such a sale could not have been raised. In the subsequent case of *Lange* v *Liesching* (Foord's Rep., 55), the question was whether a *fidei-commissary* legatee, whose interest in the land bequeathed had not been registered, could claim the land from a *bona-fide* purchaser at a sale in insolvency. The land had been transferred to the purchaser, and the Court held that the legatee had no right of vindication. Reference was there made to *Voet's* statement that movable property sold by judicial sale cannot be reclaimed by the true owner, but according to *Matthaeus* (par. 7, 17), the owner of the goods who had no notice of the sale might recover them on paying the price, but if he had notice and did not protest, he had no right of vindication whatever. It is not necessary for the purpose of the present case to inquire whether judicial sales, or sales in insolvency, of movables as conducted in this colony, have a similar legal effect; nor would I have discussed the question of markets-overt if it had not been necessary to make it clear that our present decision will not have the effect of overruling the case *Van der Merwe* v. *Webb*, upon which the Court below based its judgment. The only legally recognised markets in this colony are the Municipal markets, and there exists no provision in our law requiring the same caution and precision in the conduct of sales thereat as were required in the Dutch free markets. The privileges enjoyed by purchasers at such markets rested upon customs which were peculiar to the country where they originated, and which have never yet been held to be binding in this colony. The right of the defendant to retain the bank note in question rests upon broad principles, which, even if they had not been clearly recognised by the Dutch law, are firmly established in our law. As *bona-fide* holder of the note, he alone was entitled to receive the amount from the bank; he gave value for it in the ordinary course of business; he treated it as cash, and was justified by commercial usage in so treating it; and no former holder is now entitled to recover the note or its value either from him or from the bank. The appeal must therefore be allowed, with costs in this Court and in the Court below.

Mr. Justice Buchanan concurred, and was of opinion that the case of *Van der Merwe* v. *Webb* did not apply in this instance. His lordship did not think it was necessary that a note should be a legal tender before it could be treated as money in this colony; so long as by custom it could be treated as cash the principle in the case of *York* v. *Van der Lingen* would apply.

Mr. Justice Upington concurred, and said if the Court were to hold otherwise it would overthrow commercial usage in this country.

[Appellants' Attorney, C. C. Silberbauer; Respondent's Attorney, J. Hamilton Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

KOCH V. CARSLAW.—CARSLAW V. KOCH. 1894. Feb. 5th

Promissory note—Lost bond—Certified copy—Stay of execution—Costs.

On the 13th December 1893 C *signed a promissory note in favour of* K. *for* £230 *payable on the 14th December*, 1893.

At the time the promissory note was signed a bond for £230 (in settlement of which the promissory note was given) *passed on the 12th June*, 1882, *by* C. *in favour of* K., *was still registered in the Deeds Office.*

K.'s *agent at the time the promissory note was signed represented to* C. *that the bond, duly cancelled, would be returned to him on the following day* (the due date of the note).

On the due date C. *tendered the amount of the promissory note on condition that the bond was delivered to him, owing however to the loss of the bond this could not be done, and* C *refused to pay the amount of the promissory note.*

but was advised that he had better wait until an executor had been appointed in the estate of the late Frederick Bertie Worsley Roberts.

That on the 13th December last he was informed that executors had been appointed, and immediately on receipt of this information, having further claims against Roberts's estate, he stated cases for the opinion of counsel, and that before the last opinion was received he was served with the present notice.

That he was advised he had a good cause of action against Roberts's estate, and that it was his intention to commence an action forthwith and bring the same for trial in the Uitenhage Circuit Court on the 6th March next.

That on receipt of the present notice of motion he at once came from Uitenhage to Cape Town at great expense and personal inconvenience in order to facilitate and expedite the bringing of his action, and to prevent the same from being thrown over the ensuing Circuit Court at Uitenhage.

That since his arrival in Cape Town he had obtained an order giving him leave to consolidate his actions and to make the present applicant a co-defendant with the executrix testamentary.

That his instructions to settle declaration were in the hands of counsel, and that his summons and declaration would be ready for service in a day or two.

Lastly, he said that since he had been informed of the appointment of the executrix testamentary, he had done everything in his power to shape and formulate his claims against the estate of the late Mr. Roberts, and up to the present time he had done everything that could be done to prosecute the same with the greatest diligence.

Mr. Searle, Q.C., was heard in support of the application.

Mr. Sheil appeared for the respondent.

The Court made no order on the application, but directed the respondent to forthwith bring his action in the Supreme Court. Costs to be costs in the cause.

[Applicant's Attorneys, Messrs. Van Zyl and Buissinné; Respondent's Attorney, C. Broad.]

CURREY V. INCORPORATED LAW SOCIETY.—INCORPORATED LAW SOCIETY V. PHEAR. | 1894. Feb. 1st.

Attorney—Professional Misconduct.

An attorney, practising in the High Court of Griqualand, having been requested by the Judges of that Court, by means of a letter addressed to him by the Registrar, to explain certain statements made by him in an affidavit in a pending case which the Judges had reason to believe were incorrect, and having been further told that if such explanation were not given further proceedings would be taken against him, answered, in effect, that he would not give any explanation by letter, but that he would reserve anything he had to say till proceedings were taken, when he would have an opportunity of making his defence on oath.

It was proved to the satisfaction of the Supreme Court that the incorrectness of the statements were caused by a mistake in a telegram received by the attorney.

Held, *that there was no ground for a charge of professional misconduct against him.*

These two matters were heard together.

The first was an application on notice that on the hearing of the second application Mr. John Blades Currey would intervene and apply to be heard before this Honourable Court, and that he would pray that the costs of this appearance might be paid by the applicants (the Law Society)

The second application was on notice that application would be made to the Court requiring the respondent (Phear) to show cause, if any, why he should not be struck off the roll of attorneys and notaries, or why such other punishment should not be inflicted upon him as to the Court might seem meet, on the ground that he, being an attorney, and as such also an officer of the High Court of Griqualand West, was guilty of professional misconduct in having treated with contempt, and having declined, without lawful cause or excuse, to give the information asked of him, or to answer the request made to him by the judges of the High Court of Griqualand West through the Registrar of that Court in certain letters, dated respectively 30th September and 5th and 19th October, 1893, as to whether when he, as the attorney for the London and South African Exploration Company, presented their petition to the High Court on the 14th September, 1893, he was or was not aware that his clients, the said company, had presented or intended to present a petition to the Chancery Division of the High Court of Justice, England, for the winding-up of the North-Eastern Bultfontein Company. And that he would also be required to show cause why he should not be ordered to pay the costs of this application.

The facts are briefly these. On the 27th September last the "Diamond-fields Advertiser"

not be varied, a general agreement could be entered into which defendant could have enforced in a cross-action. Had there been a cross-action the Magistrate would have been justified in giving judgment for the plaintiff, and for the defendant on the cross-claim, and merging the judgment in staying execution pending delivery of the bond to defendant. That is practically what has been done in this case, and I think the judgment was right to that extent. Now the question is whether, if the plaintiff had tendered a copy of this bond, duly cancelled by the Registrar of Deeds, that would have been sufficient? I am of opinion that it would, because the bond would have been delivered if a certified copy had been lodged in the Deeds Office duly cancelled, so as to prevent any one from suing upon it. Now, upon whom did the onus lie of obtaining such a copy? Surely upon the plaintiff, who lost the bond. So upon the whole, although the Court now varies the judgment in order to assist the plaintiff, the order will not affect the judgment of the Court. It is a variance merely to assist the plaintiff. The Court will amend the judgment by inserting after the words mortgage bond "or a copy thereof," and will authorise the Registrar of Deeds to issue a copy of the mortgage bond duly cancelled. Each party will have to pay his own costs of appeal. The Magistrate in the Court below was perfectly justified in giving the plaintiff his costs. The plea of fraud has entirely failed, and there is not the least evidence to support it.

Their lordships concurred.

[Attorneys for Koch, Messrs. Fairbridge & Arderne; Attorney for Carslaw, W. E. Moore.]

BEVERN'S TRUSTEE v. KRETSCHMAR. { 1894. Feb. 5th.

Senatus - Consultum Velleianum—Consideration—Suretyship—Woman—Exception.

A woman who promises to pay the amount of a debt owing by another loses the protection of the Senatus—Consultum Velleianum *if she has received good consideration for the promise.*

The summons in a Magistrate's Court alleged that in consideration of the plaintiff releasing one C. *from custody under a writ of civil imprisonment the defendant, a woman keeping a boarding-house, promised to pay the plaintiff a certain sum of money owing by* C.

It appeared that it was for the benefit of the defendant that C., *who was a boarder with her, should be released.*

An exception to the summons on the ground that the defendant was a woman having been allowed,

Held, on appeal, *that as the summons* prima facie *disclosed good consideration for the defendant's promise, the case ought to have been heard on its merits, and the case was remitted accordingly.*

This was an appeal from a decision of the Assistant Resident Magistrate for Cape Town in an action brought against the defendant, Elizabeth Kretschmar, a boarding-house keeper, of 84, Long-street, Cape Town, assisted by her husband as far as need be.

The summons alleged that on the 20th day of November, 1893, one Richard Chambers was duly arrested by the messenger of the Resident Magistrate's Court of Cape Town on a warrant granted by the Resident Magistrate of Cape Town on an unsatisfied debt in the matter in which the trustee of the insolvent estate of Alfred Bevern was the plaintiff and the said Richard Chambers was the defendant.

That on the aforesaid date the said Richard Chambers was released and the warrant withdrawn at the special instance and request of the said defendant, Elizabeth Kretschmar, and on her undertaking, agreeing, and binding herself to take over, to pay, and to satisfy the said plaintiff in his aforesaid capacity the sum of £9 19s. 9d., the amount for which the said Richard Chambers was arrested, and all further costs connected therewith amounting to £1 12s. 10d., of which £3 5s. has since been paid, leaving a balance of £8 7s. 7d., which said sum defendant neglects and refuses to pay.

Wherefore the plaintiff prays that she may be adjudged to pay the same with costs of suit.

The defendant's agent excepted to the summons on the grounds that as it appears from the summons that the defendant became surety for one Chambers no action against her lies, inasmuch as she being a female has not renounced the exception of *Senatus Consultum Velleianum*.

The Assistant Resident Magistrate sustained the exception with costs; the following being his reasons:

In sustaining the exception taken to the summons with costs, the Court took no evidence, as it was not denied by plaintiff that the defendant was a married woman, and as it appeared

from the summons that the defendant became a surety for the debts of another, the Court considered the exception a fatal one.

From this judgment the plaintiff now appealed.

Mr. Molteno was heard in support of the appeal, and relied upon *Oak* v. *Lumsden* (3 Juta, 144) and *Mackie, Dunn & Co.* v. *McMaster* (2 Sheil, 165).

The respondent did not appear.

The Court allowed the appeal.

The Chief Justice said: The defendant is sued upon a promise to pay a definite sum of money in consideration of the plaintiff releasing her boarder, Chambers, from custody. But for her promise the plaintiff would have kept Chambers in custody under the decree of civil imprisonment until he paid the debt owing by him to the plaintiff. The defendant was herself benefited by the release of her boarder and cannot be allowed, merely by excepting to the summons, to evade liability to fulfil her promise. No doubt the *Senatus Consultum Velleianum* protects a woman from liability on an undertaking to pay the debt of another, but she loses this protection if she herself received consideration for her undertaking. Instead of allowing the exception, the Magistrate ought to have heard the case on the merits. He would then have been in a better position to judge whether the defence is an honest one or not. *Prima facie* the summons discloses some consideration for the defendant's promise and even a want of good faith on her part. The appeal must therefore be allowed with costs in this Court, and the case remitted to the Court below to be tried on its merits.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Fairbridge & Arderne.]

DE SMIDT V. AFZELIUS. { 1894. Feb. 5th.

This was the petition of Jacob de Smidt, of Belle Alliance, Cape Town.

It appeared from the petition that the respondent was indebted to the petitioner in the sum of £40 10s. for rent due since May, 1893.

That the respondent had refused payment of the rent, although it had been demanded.

The petitioner alleged that he was afraid the respondent might remove his goods and chattels from the hired premises to the detriment of his just lien as a landlord, and that he was about to institute an action in the Supreme Court for the recovery of the debt.

The prayer was for an interdict restraining the respondent from removing his goods and chattels pending the bringing of the action.

Mr. Sheil was heard in support of the application.

The Court granted the order as prayed.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

KOCH V. CARSLAW.—CARSLAW V. KOCH. { 1894. Feb. 6th.

In this matter the Chief Justice said he wished to make it clear that the Court yesterday did not decide the case upon its merits; it was for the Magistrate to decide whether it was a case of suretyship or not.

Mr. Justice Buchanan: In other words, the defence should be pleaded, not raised by way of exception.

ROWE V. ROWE. { 1894. Feb. 6th.

This was an action for divorce instituted by the plaintiff against her husband on the grounds of his adultery.

The declaration alleged that the parties were married in 1872, and that the adultery was committed in 1891 and 1892. The prayer was for a decree of divorce, division of the joint estate, and costs.

Mr. Joubert appeared for the plaintiff; the defendant appeared in person.

Johanna Elizabeth Rowe, plaintiff, deposed: I was married to defendant in 1872, and lived with my husband until 1891. He left me on 17th April of that year. Since that time I have not lived with him. He left me with my mother. He had had a quarrel with a lodger in the house, and my mother took my side. He has not contributed one farthing to my support. I heard certain things about him, in consequence of which I brought this action. We were married in community. He has a flour store and confectionery shop. There was one child of the marriage, but it died.

Mr. Rowe, interposing, said the flour store was not his own, he conducted it for third parties. He had sent plaintiff a letter asking her to return and live with him. She did not return. He admitted the adultery, but excused himself because his wife would not return. There never were any rows. The disagreement was wholly due to the mother.

Defendant to plaintiff: Do you remember that on the farm of Old Deer Park I nearly shot myself?—That was through jealousy.

Have I ever kicked you?—Yes. You beat me in 1887 on St. John's Day.

Defendant said he lost a deal of money at Johannesburg in endeavouring to improve his position for the sake of his wife.

While you were my wife living with me were you ever without money?—I did not get what I wanted. I am a dressmaker, and am now supporting myself.

Defendant stated to the Court that he was obliged to take a house in Dorp-street, and he must have a housekeeper.

Julia Darling Howcroft deposed that she answered an advertisement in the papers, and became housekeeper to defendant. She lived with him as his wife. She afterwards left him.

The Court granted a decree of divorce with costs, and ordered the joint estate to be divided between plaintiff and defendant, and appointed Mr. H. Hands as receiver.

[Plaintiff's Attorneys, Messrs Reitz & Herold.]

GREEF V. VAN DER WESTHUYSEN. { 1894. Feb. 6th.

Trespass—Damage—Interdict.

This was an action instituted by Henry Thomas Greef against Wietsche Marthinus van der Westhuysen for £100 damages for trespass and for an interdict.

The declaration alleged that the plaintiff was a farmer residing at Zout Kloof, in the district of Worcester, and that the defendant was also a farmer, residing at Koodoosfontein, in the district of Prince Albert.

That the plaintiff was the owner of the farm Zout Kloof, and also of the farms Doornfontein and Palmietfontein Vlakte, which adjoin one another, and also adjoin Zout Kloof.

That on or about the 15th October, 1893, the defendant by himself, his servants, and agents wrongfully and unlawfully trespassed upon the said farms Palmietfontein Vlakte, Doornfontein, and Zout Kloof by driving on to and over the said farms several flocks of sheep, numbering about 5,000 in all.

That the said sheep trampled down and destroyed the pasturage and herbage upon portions of the said farms, which the plaintiff had carefully reserved and protected, and otherwise inflicted upon the plaintiff loss and damage to the extent of £100.

The plaintiff claimed:

(*a*) £100 damages.

(*b*) An interdict restraining the defendant from trespassing in the future upon and unlawfully driving his sheep over the said farms.

(*c*) Further relief, with costs of suit.

The defendant in his plea said he had no personal knowledge of the trespass complained of, but that he was willing to pay to the defendant, and on or about November 6, 1893, tendered to [illegible] £10 (together with 10s. 6d. for a letter of demand) for and in respect and in full satisfaction of any trespass which his sheep (4,000 of which were driven by defendant's servants along a path across plaintiff's farm) might have committed.

He denied that the plaintiff had sustained any damages over and above £10, and he said that he intimated to plaintiff at the date of the said tender that he was willing to undertake not to trespass upon plaintiff's said farms.

He said that the above tender was sufficient, and was made within a reasonable time, and by reason of the facts, he prayed that the plaintiff's claim might, and subject to the said tender, be dismissed with costs.

The replication denied that the tender was sufficient, and issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., and Mr. Molteno appeared for the plaintiff, and Mr. Searle, Q.C., and Mr. Webber for the defendant.

Henry Thomas Greef, plaintiff, deposed: I live at Zout Kloof, in the division of Worcester. I own two farms there, Palmietfontein Vlakte and Doornfontein. I know defendant. He has been accustomed to trek to the Karoo with his sheep. There is a trek path through my farm. It is the main road between Beaufort and Ceres. Defendant came down the Sutherland road with his sheep in October last. He should have passed my farm near the main road. I have a piece of veld on Doornfontein. It is a reserved veld. A small river runs here. It is the best grazing on my farm, being very sweet. I reserve it for my cattle. I had kept the sheep off it. Defendant knew that I reserved this piece of veld for my cattle. I had told him so before he went up to the Karoo. I told him he might graze his horses there when he outspanned, but he must not let his sheep on to the veld. I remember on 15th October he trekked past my farm. When I heard that he had brought his sheep over my veld I said it was a pity his boy had passed, for I would have liked to send him to prison. My own boy had told me that the sheep had gone over the whole of the veld. Next day Mr. Du Toit, a neighbour, told me what had happened. The sheep had gone over the veld. I have not been able to put cattle on the veld since. The last rain was in March, and the veld will not improve till we get rain. Had the defendant asked me to go through with his sheep, I would not have allowed him. I have sustained £50 damages. The width of the veld there is about a mile.

Cross-examined by Mr. Searle, Q.C.: I have about 25,000 morgen. Portions of my farm are enclosed. One portion (4,000 morgen) is enclosed, and another 1,200 morgen. This portion that [illegible] is enclosed. It is

reserved veld. It was very dry at the time. I did not think much of the incident at the time. Defendant was trekking at the rate of about ten miles a day. I could not say where he outspanned that night. I did not go and examine the spare veld after defendant and his sheep had passed through. Defendant tendered me £10, but I would not have it. The Boers trek by way of Ceres, but on returning from the Karoo they come by way of Beaufort. I only bought those, the farms Doornfontein and Palmietfontein, last April. I bought them from my father. My father had reserved the veld. I have about 4,000 sheep. I should say that defendant had 5,000 sheep when he passed through on the 15th October. I cannot get any other veld for my cattle. My veld is chiefly suitable for sheep. I cannot afford to enclose any more veld at present. As a rule I don't hire out veld, but I sometimes assist needy people. Winter veld is about 5s. for 100 sheep, and summer veld 8s. per 100 per month. Defendant is not my friend, he is an acquaintance.

Re-examined: Defendant had trespassed before, in my father's time.

By the Court: The custom of the country is to let flocks wander, not to keep them strictly to the trek path.

Jacobus du Toit, of Laingsburg, deposed: In October last, I remember defendant trekking across by my farm, and he asked me if I would allow him to take a short cut. I said he might, but it would do him no good, as he would have to go round when he came to plaintiff's boundary. He said he would see that he would not be caught. I saw him enter Greef's veld near the beacon. That would take him right into the spare veld. On the Sunday I rode to Greef's and told him. My experience as a farmer leads me to this, that if a piece of veld is eaten off by sheep, cattle won't afterwards stay on it.

Cross-examined: I knew when he started to go through the veld that he would cause damage. I allowed him to go, nevertheless. I have some veld of the same kind as Mr. Greef's. I have eight mules on Mr. Greef's veld, and I pay a dollar a month. I have no farm. I was Mr. Conradie's manager last October. There is no fence between Conradie's and Greef's. The flocks were always on the move. They were not allowed to stand.

The overseer on plaintiff's farm deposed: On the Monday after the defendant's sheep had crossed the spare veld I traced the spoor of the sheep all along. They covered the whole width of the spare veld. That veld was over 1,000 yards from the road. The veld was completely eaten down. We had to put the cattle into the ostrich camp. They would not stay on the

Cross-examined: The sheep made an hour's trek across Mr. Greef's ground. He did not see the sheep trek across the veld. They might have taken three hours from the beacon to the end of the veld.

A shepherd in plaintiff's employment deposed The spare veld was in good condition before the defendant's sheep went over it. Witness saw them crossing the veld and spoke to defendant's shepherd.

Cross-examined: It was in the afternoon he saw them.

Hendrik Jonker, shepherd in Mr. Du Toit's service, deposed that he remembered the sheep coming through his master's ground. He knew the boundary between Du Toit's and Greef's. Van der Westhuizen's sheep went over that boundary on the Friday.

Cross-examined: They crossed near the beacon.

This closed the plaintiff's case.

For the defence,

Wietsche Marthinus van der Westhuizen deposed: I have a farm in the Prince Albert district, and I also have a farm in the Sutherland district, and I take my flocks there in winter. I returned last October. I had my children with me and Mr. Le Roex, and five shepherds and 4,100 sheep. We had a wagon. I was with the wagon—sometimes before the sheep and sometimes behind them. I left Kranz Kraal, in the Karoo, on Monday, 9th October, and reached Mr. Greef's farm on the Saturday of the same week. I know nothing about this trespass. Mr. Greef spoke to me on the day I arrived at his place. He told me that a Kafir had taken one flock of sheep out of the track and on to the veld. I was sorry to hear it, and Mr. Greef said if he could have got hold of the Kafir he would have broken his neck. I saw Mr. Du Toit on the morning of Friday. There was a road leading straight ahead, and Mr. Du Toit said it was no use my going down there, as it was blocked further down. I therefore took a roundabout road. We spent the Friday night on the Beaufort and Ceres road. The sheep were with us. In the morning I went ahead with the wagon to Mr. Greef's. I can't say where my sheep entered the veld. I arrived at Mr. Greef's between nine and ten a.m., and the sheep came along about midday. There were thousands of sheep trekking along the main road about this time. Mr. Greef has never warned me about trespassing on that piece of veld. I do not consider that my sheep could have done damage amounting to £10 even if the entire flock had trekked over it.

Cross-examined by Mr. Innes: I travelled over a number of farms on my last trek, but

that piece of veld which belonged to Mr. Greef was reserved veld. Mr. Du Toit told me that if I went over by Mr. Greef's border Mr. Greef would object. I then told my boys to take the Sutherland road. I was on the road the whole time. I tendered the £10 because one flock had left the road. When I left Du Toit's I told my boys to keep to the road and take no short cut. My sheep were very poor and thirsty. Some good veld might have done them good. But they went round by the road. I offered to pay Du Toit £5 for damage, just to prevent him bringing a case into court.

Lourens Johannes Jacobs, inspector of roads for the division of Beaufort, and a sheep-farmer in that district, deposed: I was along the Matjesfontein and Sutherland road in October last. I came across four flocks of sheep on the 19th, On the 21st I saw seven or eight wagons where the Beaufort road strikes the Sutherland road, and seven or eight flocks of sheep. I know the plaintiff's farm and the short cut. If the whole 4,000 sheep had gone across Mr. Greef's veld I don't think they could have done £10 damage. The veld is thin karoo. I think £1 would have been ample. The regular charge for good karoo veld and water is 5s. per 100 per month. I think that 2s. 6d. would have been enough for Mr. Greef's veld in the condition it then was.

Cross-examined: I don't know this piece of sparo veld.

By the Court: It is bush veld. One day's crossing would make no difference. Cattle would still remain on it. If it had belonged to me I should have charged only £1 for the damage.

Christian le Roex deposed: I live with defendant. I was trekking with him last October from Kranz Kraal to Prince Albert. We slept the Friday night on the road about one and a half hours from Mr. Greef's farm. Saturday morning we went on to Greef's. The veld was bad.

Cross-examined: I saw no trespass. The sheep were in poor condition.

John H. Schneiders, sheep-farmer, Buffels Vlei, deposed: I know the farms in question, and have constantly gone over them with my sheep. In September last I trekked through them. The veld was in poor condition.

Jacob Peters, defendant's herd, deposed: I had charge of one of the five flocks of sheep on the day in question. It was the second flock. The first flock was in charge of a Kafir. It was a little distance out of the trek. I saw Mr. Greef's servant talking to him, and he turned into the road again. The veld there was poor.

Cross-examined: My master told me that Greef would not allow us to take the short cut.

This concluded the evidence for the defence.

After argument,

The Chief Justice said: The crucial question in this case is whether Du Toit spoke truthfully or not. If Du Toit spoke truthfully there can be no doubt that this was a deliberate and, I might almost say, a fraudulent trespass on plaintiff's property. Du Toit says that on the day in question defendant on coming to his place requested leave to make use of the short cut; leave was granted, but Du Toit told him plaintiff might object to his coming over his veld. whereupon defendant said that "as far as Greef was concerned he would take care not to be caught," or words to that effect. Then Du Toit goes further and says after this conversation he saw defendant's sheep driven in the direction of plaintiff's farm, and he saw defendant put out in the direction of the beacon, telling his herd to drive the sheep towards the beacon. He is supported in this evidence by the evidence of witness Hendrik Yonker, who says, "I know the boundary. Defendant's sheep crossed the line. It was on the right-hand side of the beacon. They crossed close to the beacon." Here is a distinct corroboration that the sheep did go in the direction of the beacon. The defendant's case now is that the sheep never went in that direction at all. They never took a short cut over Du Toit's land; they went some miles to the left, came down at right angles to the road, whence they were driven along the trek path to Mr. Greef's farm. Between these two statements we have to decide. In my opinion the evidence of Du Toit is truthful. We have also the evidence of the shepherd, who on the Monday following was sent by his employer to follow up the spoor of the sheep. He went to the neighbourhood of this beacon, and there he found the sheep spoor, coming from the direction of Du Toit's place, crossing his employer's boundary, and he followed it up in one continuous course from that point. He says they were footmarks of sheep not as if they were driven continuously, but as if they were grazing along as they went. There is also the evidence of Greef, who says that before defendant went to his Sutherland farm he passed over his (plaintiff's) farm, and they then had a conversation about this very veld, and that defendant asked permission to outspan there, which was granted; but he told him definitely that he was not to allow his sheep to come over that land, because he had reserved it for his own cattle. Upon this point he is flatly contradicted by the defendant. If I disbelieved defendant on the point where he contradicts Du Toit, I am bound also to disbelieve him on this point where he contradicts

Greef. The sheep were driven by the short cut over the boundary at the beacon, and for a period of nearly twenty-four hours over the reserve veld. It was a clear deliberate trespass, and was done with the object of getting the good grazing ground which the plaintiff had reserved for his cattle. That being so, it is clearly a case for substantial damages. But it is more than that. It is a case for an interdict also. It is true defendant says he is not going to do it again, but if plaintiff's evidence is to be believed, these promises cannot be depended upon. The case for the interdict has been made out. The judgment of the Court will therefore be for plaintiff for £25 damages with costs, and further granting an interdict restraining the defendant in future from driving sheep over plaintiff's farms mentioned in the declaration, otherwise than along the roads mentioned therein.

Mr. Justice Buchanan concurred, and characterised the offence as a wilful and wanton trespass, and not merely an accidental one.

Mr. Justice Upington thought the case ought to be a warning to farmers all over the country, that it was most advisable to enclose their farms a little more than they now do.

[Plaintiff's Attorney, C. C. de Villiers; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

ALIWAL NORTH BOARD OF EXECUTORS v. DIESEL. 1894. Feb. 8th.

Mr. Molteno moved for provisional sentence for £8 8s., certain moneys advanced by the Board on behalf of the defendant; also for provisional sentence on a mortgage bond of £250, with interest at the rate of 7 per cent. from the 21st of November, 1891.

The orders sought were granted, and the property declared executable.

JAGGER AND CO. V. ROBB.

Mr. Buchanan moved for provisional sentence for £100 on two promissory notes, with interest from September 1, 1893; also for judgment under rule 329 for £17 2s. 4d. for goods sold and delivered.

Granted.

GREEF'S EXECUTRIX V. SOLOMON LEVIN AND ANOTHER.

Mr. Graham moved for provisional sentence for £1,000, and £32 10s. interest, on a deed of sale.

Judgment was given against the first defendant.

HERMAN'S EXECUTORS V. VAN HEERDEN.

Mr. Jones moved for provisional sentence for £144, eighteen months' interest on a mortgage bond for £1,600.

Granted.

STIER V. LOUW.

Mr. Graham moved for provisional sentence for £141 14s., with interest, for goods sold and delivered.

Granted.

ADMISSION.—*Ex parte* MICHAU.

Daniel Jacobus Michau was, on the motion of Mr. Buchanan, admitted as an attorney and notary, the oaths to be taken at Kimberley.

REHABILITATIONS.

The following rehabilitations were granted on motion from the Bar: Christoffel H. Rothman, David Gerrand.

REYNDERS V. REYNDERS.

Mr. Buchanan moved on behalf of plaintiff for removal of the suit instituted by him against his wife for divorce from this Court for trial at the next Circuit Court at Barkly East.

The application was granted, subject to notice being given to the defendant.

In re CHISM.

Mr. Shippard moved for the removal of Thomas Little from his office as *curator bonis* of petitioner, on the ground that the necessity no longer exists for such curator.

The application was granted, subject to the rendering of a proper and due account, to the satisfaction of the Master, by the curator.

EADY V. EADY.

Mr. Graham applied for an order requiring the respondent to pay to his wife the sum of £25 to enable her to prosecute her action against him for divorce,

The affidavit of the plaintiff stated that she had no funds at her disposal. She had boarders at Observatory-road, but would be unable to carry on the boarding-house, as her husband had given her no money for some months. She alleged that she caught him in the act of adultery with the servant.

The defendant, who appeared in person, read an affidavit denying many of the statements in his wife's affidavit, and strongly denying the adultery. He stated that he was now out of employment, and had absolutely nothing. On November 5 he was arrested at his wife's instigation on a charge of shooting.

The Chief Justice: What became of that case?

Respondent: The Attorney-General refused to prosecute.

The Chief Justice: Did she make the charge?

Respondent: No; she instigated a man named Black, a boarder in the house, to make the charge against me.

The Court made no order on the application. Costs to be costs in the cause.

Ex parte KOLLER'S EXECUTORS. { 1894. Feb. 8th.

Lost bond—Legal holder—Deeds Registry Act, 1891—35th Regulation.

Where it was proved to the satisfaction of the Court that the amount of a lost bond had been paid, but the declaration required by the 35th Regulation framed under the Deeds Registry Act, 1891, could not be made as the address of the legal holder was unknown, the Court directed the cancellation of the bond.

This was the petition of the executors testamentary of the late John Thurston Koller.

On the 12th April, 1883, Koller and one James H. Steer (now deceased) passed to and in favour of one James Thomas Butler a mortgage bond for the sum of £800, hypothecating certain land and buildings in Cape Town.

In October, 1885, Koller being then dead, his executors, by arrangement with the said Steer, took over the latter's share in the said property, and thereupon became solely responsible for the balance of the said bond, which then stood at £700.

Steer thereafter acted as Butler's agent, and the executors thereupon paid to him the following sums on account of the said bond: On the 12th March, 1886, £150; on 22nd April, 1886, £200; on the 30th September, 1886, £250; and on 14th July, 1887, £100, making in all £700.

The executors moreover paid all interest du on the said bond.

The petitioners alleged that they had n recollection of having ever received the sai bond, nor of having had the same in the possession after payment thereof had bee made as aforesaid, and could not find the sam although they had made diligent search for it.

After Steer's death, his business was carrie on by James H. Steer & Co. The petitione applied to the representatives of the said fir (which has been dissolved) for information to the said bond, and procured from Thom Herbert Hazell, one of the partners thereof, declaration in terms of section 5 of Act 19 1891, to the effect that he had examined Stee books and found that the sum of £700 w received by him from Koller's estate in payme of Butler's bond, and that the said sum h been duly accounted for to the said Butler.

The petitioners applied to the Registrar Deeds to cancel the bond under the provisio of the Deeds Office rules, but he was of opini that the present case did not come within t scope of the said rules.

The petitioners alleged that they had ne received notice of any cession by Butler of t bond, nor had any interest ever been paid by demanded from them in respect of the said bo since the amount thereof was paid by them Steer.

The prayer was that the Registrar of De might be directed to cancel the bond.

Butler's whereabouts are at present unkno

Mr. Jones was heard in support of the ap cation, and explained that the 35th rule of Deeds Office requires a declaration to be m by the person who was the legal holder, or his representatives if dead, at the time bond was lost.

Here the legal holder could not be found, agent was dead, and the representative of agent had made the declaration.

Mr. Justice Upington said that the ma had come before him in chambers, but thought that such cases should come be the Court when the Court was sitting.

The Chief Justice, in granting the o entirely agreed with Mr. Justice Uping More publicity would be obtained by ma such applications in open court.

[Petitioner's Attorney, W. E. Moore.]

Ex parte COETZEE. { 18 Feb.

Minor—Maternal inheritance—Partners

Under special circumstances and where it clearly for the benefit of a minor, the

authorised the Master to pay out to the minor the amount of his maternal inheritance to enable him to enter into a business partnership with his brother.

This was an application for an order directing the Master to pay out to the petitioner the amount standing to his credit in the Guardians' Fund, to enable him to enter into partnership with his brother and his partner, who are about to start business in Venterstad.

The petitioner is a minor nineteen years of age, living apart from his father, and the money in the Guardians' Fund is due to him out of the estate of his mother under the joint will of herself and her husband.

The will, which was invalid, not being executed in the terms of the Wills Ordinance, but which has been acted upon and accounts filed, provided that the heirs should only receive their portions on reaching majority.

The petitioner's father approved of the present application, and the Resident Magistrate for Albert and the Rev. Mr. Snyman, of Venterstad, also filed affidavits alleging that the petitioner's proposal to go into business would be for his benefit.

Mr. Sheil for the petitioner.

The Court granted the application.

The Chief Justice: This is a very special case. This young man seems to have been in business for some time, and to have done well in it. The Magistrate thinks this money will be for his benefit, and his father, his natural guardian, also thinks he will do well to go into business, and the Rev. Mr. Snyman and others of his friends are of the same opinion. The Court, therefore, ought not to stand in the way of this young man's advancement, but it is only because it is such a special case that we make the order.

Applicant's Attorney, G. Montgomery-Walker.]

LOUW V. LOUW.

Mr. McLachlan moved for leave to petitioner to sue *in forma pauperis* in an action against her husband for divorce, by reason of his alleged malicious desertion and adultery.

Referred to counsel.

BROWN V. BRUCE.

On the application of Mr. McLachlan, the rule *nisi* was made absolute.

AUSTIN V. OSBORNE.

On the motion of Mr. Graham, a rule *nisi*, operating as an interdict and returnable this day week, was granted restraining the respondent from parting with certain shares in the Fin Propelling Syndicate.

SMITH V. MUFF, TRADING AS JAMES AND CO. } 1894. Feb. 8th.

Exception—Amendment — Summons — Husband—Magistrate's discretion.

To a summons in a Magistrate's Court directed against a married woman trading in a name different from her husband's she excepted that the summons ought to have been directed to and served upon her husband also.

The plaintiff thereupon applied for leave to amend the summons and serve an amended copy on the husband, the plaintiff paying the costs of the day.

The Magistrate having refused the application,

Held on appeal, *that the Magistrate's discretion had not been unreasonably exercised.*

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town in an action in which the present appellant sued the respondent for the sum of £8 6s. 8d.

The summons was in the following terms:

Summons Emily Muff, trading at Cape Town as hairdresser, &c., under the style or firm of E. James & Co., 115, Longmarket-street, Cape Town, that she (hereinafter styled the said defendant) appear before the Court of the Resident Magistrate of the district, to be holden at Cape Town on Tuesday, the ninth day of January, 1894, at eleven o'clock in the forenoon, with her witnesses (if she has any), to show why she has not paid to George Henry Smith, of Cape Town (hereinafter called the said plaintiff), the sum of £8 6s. 8d., which the said plaintiff complains that she owes him for wages for services done and performed by him, the said plaintiff, as hairdresser's assistant for and on behalf of the said defendant as aforesaid, and at her special instance and request, in the month of December, 1893, as per account hereunto annexed, which the said defendant neglects and refuses to pay, and which the said plaintiff prays she may be adjudged to pay, with costs of suit.

The defendant's agent excepted to the summons on the grounds that the defendant a married woman, being married to John Muff, cannot be sued without the assistance of her husband, and a copy of the summons being served on him.

The defendant gave the following evidence: I am defendant. I am married to John Muff,

who is a resident of Cape Town. I was married on the 7th June, 1888, in the Resident Magistrate's Court, by the late Mr. Crosby, R.M., by ante-nuptial contract.

Cross-examined: I carry on business as Emily Muff, trading as E. James & Co. My husband carries on a separate business as a carriage painter. I have not asked my husband to assist me in this action.

The plaintiff's agent applied to have the summons amended and a copy served on defendant's husband, and offered to pay the costs of the day.

The Assistant Resident Magistrate sustained the exception with costs, the following being his reasons:

In allowing the exception taken by defendant I was guided by the decision in the case of *Landsberg* v. *Marchand* (1 Menz., 200).

The defendant now appealed.

Mr. Graham was heard in support of the appeal, and contended that under section 50 of Act 20 of 1856 the Magistrate ought to have allowed the amendment asked for. He referred to the following cases: *Haisman* v. *Mausch* (Buch., 1879, p. 119); *Schaeffer* v. *Tweedie* (3 E.D.C. 349); *De Stadler* v. *Morris* (2 Sheil, 365); *Ex parte Pienaar* (3 Sheil, 120); *Selby v. Friemond* (4 Juta, 266).

Mr. Watermeyer for the respnodent: The plaintiff asked for more than an amendment of the summons; he asked for an amendment of the service of the summons, and this the Magistrate could not grant under section 50 of Act 20 of 1856. The Magistrate was bound by the decisions in *Landsberg* v. *Marchand* and *Prince* v. *Anderson* (1 Menz., 200 and 176). See also Voet (5, 1, 14, *et seq*). No precedent has been cited for allowing an amendment of service of a summons. If such a case were in the Supreme Court proper service of the summons would be ordered.

Mr. Graham in reply.

The Court dismissed the appeal.

The Chief Justice said: I am unable to say that there has been such an unreasonable exercise of his discretion by the Magistrate as to justify the Court in allowing this appeal. An exception was taken to the summons by the defendant, a married woman carrying on business in a different name from her husband's, that the summons was defective by reason of the husband not being named therein, and that service ought to have been effected on the husband as well as on the defendant. The plaintiff's agent thereupon applied for leave to amend the summons and to serve the amended summons on the husband, the plaintiff paying the costs of the day. The objection is so purely technical that I should not have found fault with the Magistrate if he had acceded to the plaintiff's application. But only a few shillings costs would have been saved by this course, and the Magistrate may well have considered that it was not advisable to encourage laxity of practice for so paltry a saving. The appeal will be dismissed, the costs to abide the result of the decision on the merits in the Court below.

Their lordships concurred.

[Appellant's Attorney, J. Hamilton Walker; Respondent's Attorneys Messrs Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PEARCE V. PEARCE — 1894. Feb. 9th.

This was an action for restitution of conjugal rights instituted by Robert Pearce against his wife, Henrietta Augusta Pearce (born McIntyre).

The declaration alleged that the parties were lawfully married without community of property before the Resident Magistrate for Simon's Town, at Simon's Town, on or about the 22nd September, 1885, and that the said marriage was still in full legal force and effect.

That there had been issue of the marriage one child, a boy, now aged eight years.

That in or about the month of September, 1893, the defendant wrongfully, unlawfully, and maliciously deserted the plaintiff, and refused, and still refuses, to return to him, or to restore to him his conjugal rights, though frequently requested to do so.

The plaintiff claimed:

(*a*) An order compelling the defendant to return to and cohabit with the plaintiff as his wife, and failing compliance with such order within such time as to the Court might seem meet.

(*b*) A decree of divorce dissolving the marriage now subsisting between himself and the defendant.

(*c*) Custody of the minor child, the issue of the marriage.

(*d*) Further relief, with costs of suit.

The defendant in her plea admitted the formal allegations in the declaration, and that she had declined to live and cohabit with the plaintiff since she became aware that he had committed adultery with one Sarah Heath. Wherefore s prayed that the plaintiff's claim might be dismissed with costs.

The defendant filed a claim in reconvention, in which she alleged that the plaintiff had wrongfully and unlawfully deserted her in the year 1890, and from that date wholly failed to provide any means for her support and maintenance.

That at divers times during the year 1893, and more particularly during the month of October, 1893, the plaintiff committed adultery with one Sarah Heath and divers other persons.

The defendant prayed for :

(a) A decree of divorce.

(b) Custody of the child of the marriage.

(c) Further relief, with costs of suit.

The plaintiff denied the charges of adultery and desertion, and issue was joined on these pleadings.

Mr. Graham appeared for the defendant.

The plaintiff did not appear, either personally or by counsel.

The Court ordered the defendant (plaintiff in reconvention) to prove her case, as the plaintiff in convention had not appeared.

Mr. N. Lacy, of the Colonial Office, produced the marriage register.

Henrietta Augusta Pearce, the defendant, deposed: I was married to my husband, Robert Pearce, on 22nd September, 1885. There is one child of the marriage, a boy of eight years. After our marriage we stayed with my father and in furnished apartments. My husband then went to Kimberley, where he stayed ten months. He came back to Cape Town and stayed with me a fortnight, going back to Kimberley. That was in the year 1887. I did not see him again till 1890, when I went to Kimberley and stayed with him four weeks. I found out something about his conduct and returned to Cape Town. He followed me down. I forgave him, and we stayed three months together, when he left for Port Elizabeth. He returned from Port Elizabeth after three months. I then told him that as he had no home to take me to we could not live any longer at my sister's. That was towards the end of 1890. He went to Johannesburg, and remained at the Rand till 1893, during which he did not contribute anything to my support. In November last he called on me at my house at Green Point and demanded the child. We had a quarrel, which resulted in a case before the Magistrate, by whom he was bound over to keep the peace. He admitted his infidelity, and said he would do as he liked. We were married by ante-nuptial contract. My father left me some money, and I have a few boarders. That is how I have been maintaining myself and my child. I will undertake to see the boy properly educated.

Christina Campbell deposed that she knew Jack Pearce, the plaintiff. This witness admitted having occupied the same bedroom for several nights with Pearce.

Ayah, a coloured woman, deposed that she had seen the last witness and Pearce (whose photo. she identified) in the bedroom together.

The Court gave judgment for the defendant on the claim in convention, and for the plaintiff on the claim in reconvention with costs, Mrs. Pearce to be entitled to the custody of the child.

[Defendant's Attorney. C. C. Silberbauer.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON K.C.M.G.]

PROVISIONAL ROLL.

BRENNER AND OTHERS v. DUNCOMBE. } 1894. Feb. 15th.

Mr. McLachlan applied for the final adjudication of defendant's estate.

Granted.

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted their rehabilitation: Andries Peterus Pepler and Carl Schnitzler.

ADMISSIONS.

Ex parte HENDERSON.

On the motion of Mr. Sheil, Mr. James Alfred Henderson was admitted an attorney-at-law, the oath to be taken before the Resident Magistrate at Engcobo, Tembuland.

Ex parte MCLEOD.

On the motion of Mr. Graham, Mr. Alfred Henry McLeod was admitted a conveyancer.

REGINA V. VAN RENSBURG.

On the motion of Mr. Giddy, this case was removed for trial to the next Circuit Court at Victoria West.

GENERAL MOTIONS.

PETITION OF DUTCH REFORMED CHURCH, STANFORD.

Mr. Watermeyer applied for an order making absolute the rule *nisi*, issued under the Titles Registration and Derelict Lands Act, for the transfer to the petitioners of a certain portion of the farm Klein Riviers Valley, in the division of Caledon, registered as the property of Philippus S. de Bruyn, who became insolvent in 1872, and whose estate is wound up and unrepresented.

Granted.

BATCHELDER V. BATCHELDER.

Mr. Currey moved on behalf of petitioner, Catherine Batchelder, for leave to sue *in forma pauperis* in an action against her husband for judicial separation by reason of his alleged ill-treatment and cruelty towards her.

Referred to counsel.

LOWRENS V. LOWRENS' TRUSTEE.

Mr. Searle, Q.C., for applicant: Mr. Innes, Q.C., for respondent.

In this case the interdict was by consent continued pending the bringing of an action forthwith.

DE WITT V. CAPE CANNING COMPANY.

Mr. Searle, Q.C., for applicant; Mr. Schreiner, Q.C., for respondent.

This was an application for a postponement of the trial of the suit between the parties until next term, on the ground of the absence from the Colony of a material witness for the defence, Mr. L. Strasburger.

After argument,

The Chief Justice said there would be no order; the case would go to trial on the day fixed, but the Court would not give judgment until Mr. Strasburger had had an opportunity of being examined, and if need be Mr. De Witt might be produced afterwards for the purposes of cross-examination. The costs of this application to be costs in the cause.

LOUW V. LOUW.

Mr. McLachlan applied for a rule *nisi* requiring the respondent to show cause why the applicant, his wife, should not be permitted to sue him *in forma pauperis* in an action for divorce, by reason of his alleged desertion and adultery.

The Court made the order, the rule to be returnable on 1st May, personal service to be effected,

IN THE INSOLVENT ESTATE OF GEORGE MAS EDMEADES, DECEASED.

Mr. Molteno applied for the removal fro his office of trustee of the insolvent estate Johannes G. Ehlers of one Julius Archer, wl has left the Colony and whose address is u known, and for the appointment of a ne trustee, to enable the petitioner to obta transfer of a plot of ground in Oudtshoor purchased by the said Edmeades from Ehlers.

The Court made the order, on condition th the appellant pays the necessary expens attending the appointment of a new trustee.

STREAK V. STREAK. { 1894. Feb. 15t

This was an action for restitution of conjug rights, failing which for divorce, by reason the defendant's malicious desertion.

The declaration alleged that the parties wer married in community at Graham's Town i September, 1867, and that thereafter, in th year 1882, the defendant deserted his wife.

The prayer was for:

(*a*) Decree of restitution of conjugal right failing which,

(*b*) A decree of divorce.

(*c*) Custody of the children of the marriage.

(*d*) Forfeiture of benefits.

(*e*) Costs.

Mr. Buchanan appeared for the plaintiff; th defendant was in default.

Mr. Norman Lacy produced the origin marriage register.

Mrs. Hannah Streak, plaintiff, deposed: was married to defendant in 1867. We live happily at Graham's Town for three year My husband then went to Kimberley. I live there with him till 1882. There were fo children born of the marriage. Two sons a alive, one twenty-one years old and anothe nineteen. In 1882 I went down to see m mother at Dordrecht. I was to stay six month I stayed longer, because my husband wrot saying I was not to return till Christmas, a he was going to the Gold-fields. I believe h went there. I have not seen him since, nor ha he answered my letters. He has written since demanding the boys. We were married i community. I believe he has a share of a far worth about £600, situate in Bechuanaland. am anxious to have the custody of the children I brought nothing into the joint estate.

The Court granted a decree for restitution o conjugal rights, and ordered defendant to retur to or receive plaintiff on or before 15th April failing which, granted a rule *nisi* calling o defendant to show cause why a decree of divorc should not be granted, and a division of th

joint estate ordered, personal service to be effected. There would be no order as to the children.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

DOUBELL v. TIPPER. { 1894. Feb. 6th.

Summons—Exception—Loan—Negligence—*Actio commodati.*

To a summons for damages in a Magistrate's Court alleging in effect that the plaintiff had lent a certain horse to the defendant, who instead of taking reasonable care of it, drove it further than he had agreed to drive it, and otherwise so negligently used it that it died from the ill-treatment, the defendant excepted on the ground that it disclosed no right or title in the plaintiff to institute the action.

Held, *reversing the decision of the Court below, that* prima facie *it is the lender who is entitled to bring the action to recover the thing lent or its value, that it lies upon the borrower to raise any special defences which he might have to the lender's claim, and that the summons disclosed a sufficient title in the plaintiff to institute the present action for damages.*

This was an appeal from a judgment of the Assistant Resident Magistrate for Maraisburg, in an action in which the present appellant sued the respondent for £15 damages. The summons alleged that on or about the 19th day of July last past, and at Maraisburg, the defendant borrowed from the plaintiff a certain chestnut horse, of the value of £15, for the purpose of driving along with another horse in a spider, to a certain place called Vlekpoort, a distance of nine miles or thereabouts, and instead of going to Vlekpoort only, the defendant by his servant, a certain Willem Nel, drove the said horse to a certain farm called Willowdam, a distance of eighteen miles or thereabouts, and the plaintiff further says that the said horse was in good health at the time of the delivery thereof by him to the defendant; and that when the same was returned to him by the defendant, the said horse appeared to have been ill-used and could not stale, and although the plaintiff gave all care and attention to the said horse, he died on or about the 27th July last through the ill-treatment received from the defendant at the hands of his servant, and in consequence of which the plaintiff has suffered damage to the extent of £15, which said sum the defendant neglects and refuses to pay.

Wherefore the said plaintiff prays that he may be adjudged to pay the same, with costs of suit.

The defendant's attorney excepted to the summons on the ground that it set forth no ownership in the horse, which formed the subject-matter of the action. Nor did it declare any right, title, or interest whatever of the plaintiff in or to the horse, or its value, to enable him to bring the action, whereby the defendant was prejudiced in his defence. He cited in support of the exception, *Gifford* v. *Table Bay D. & B. M. Commission* (Buch. 1874, p. 96).

The plaintiff's attorney replied that the summons was good, and that the right and title of the plaintiff to bring the action would be proved by the records of the previous case of *Allen* v. *Doubell*, which would be put in, and that the present plaintiff was not the owner when the horse was borrowed.

The Assistant Resident Magistrate upheld the exception with costs.

The following were the Assistant Resident Magistrate's reasons:

In this case plaintiff sues defendant for damages sustained by reason of defendant's negligence to a certain horse borrowed by defendant from plaintiff, and which horse is alleged to have died through such negligence.

At the time of borrowing the horse plaintiff was not the owner of the horse.

The right and title of plaintiff to bring this action was therefore not sufficiently set forth in the summons. No witness appears to have been subpœnaed to produce the records in the case of *Allen* v. *Doubell*, referred to in the reply by plaintiff's agent. Evidence in support of ownership or title will be irrelevant, as it does not support any allegation in the summons.

Following the principle laid down in *Allett and Another* v. *Lynch* (4 H.C.R., 400), I came to the conclusion that the exception raised by defendant's attorney must be upheld, and that defendant was prejudiced in his defence.

From this judgment the plaintiff now appealed.

Mr. Webber in support of the appeal: Gifford's case has no application to the present. The mere contract of *commodatum* is sufficient to support an action (*Dig.*, 13, 6, 15). Even a thief had the *actio commodati* (*Dig.*, 13, 6, 16). A person suing in his own name need not set forth his title (*Voet*, 2, 13, 4). See also *Ackermann* v. *Adams* (1 Juta, 177), *Melville* v. *Hooper* (3 Juta, 261), and *Booth* v. *Wilson* (1 B. & Ald., 59).

Mr. Graham, for the respondent, relied on *Voet* (9. 13, 2) and *Power* v. *Divisional Council of Albany* (7 E.D.C., 211).

The Court allowed the appeal.

The Chief Justice said: If the question were whether the summons has been artistically drawn I should say, "No, it might have been better," but if the question were whether the summons gives a sufficient indication to the defendant of the case he is called upon to meet I should say "Decidedly yes." The case which the summons, as it stands, calls upon the defendant to meet is in effect this, "I (the plaintiff) lent you a certain horse. It was your duty to take reasonable care of the animal, but instead of so doing, you drove it further than you agreed to drive it, and have otherwise so negligently used it that when it was returned to me it was unfit for further use, and it soon after died owing to the ill-treatment. I therefore claim from you as damages the sum of £15, being the value of the horse." The meaning of the summons could not be mistaken by the defendant. It would have been a good defence to such an action that the plaintiff was not the owner of the horse, but a mere agent of a third person who had called upon the defendant to make good the loss. But an exception was taken that the summons does not disclose any right or title in the plaintiff to institute the action. *Prima facie* it is the lender who is entitled to institute the action *commodati*. The borrower's contract is made with him, and it lies upon the borrower to set up such special defences as will relieve him from liability to the lender. It is not therefore necessary for the lender to allege his ownership in the summons. If the defendant has any defence on the merits he would have done much better to plead it instead of taking this technical objection. There is, I regret to say it, a growing tendency on the part of agents practising in Magistrates' Courts to obscure the issues to be tried by taking the most paltry and untenable exceptions. Much expense would have been saved in this case if the defendant had pleaded at once on the merits.

The appeal must be allowed, and the case remitted to the Court below to be tried on its merits. The costs of the appeal to be also remitted to abide the result.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Scanlen & Syfret; Respondent's Attorney, G. Montgomery-Walker].

MICHLER v. SAUNDERS. { 1894. Feb. 15th.

Husband and wife—Injury to wife—Proper person to sue—Exception.

To a summons in an action brought by the plaintiff as the husband of H., *to whom he is married in community of property, for damages for injuries done to her and his child and property by reason of the negligence of the defendant's servant, the defendant excepted that the action ought to have been in the name of* H.

Held, *reversing the decision of the Magistrate, that the exception was bad and that the husband was the proper person to sue.*

This was an appeal from a judgment of the Resident Magistrate for Wynberg in an action in which the present appellant, in his capacity as the husband and legal guardian of Henrietta Michler, to whom he is married in community of property, sued the respondent for £20 damages.

The summons alleged:

1. That the defendant was the registered owner of a cab and pair of horses plying for hire in the Municipality of Claremont.

2. That on or about the 2nd day of December, 1893, the said Henrietta Michler was proceeding with a perambulator and young child along the main road from Claremont Station and turned into Dean-street.

3. That the defendant then by his servant or agent furiously and negligently drove the said cab and pair of horses against and over the said Henrietta Michler, the child, and perambulator, rendering useless the said perambulator, and injuring the said Henrietta Michler and child. The plaintiff alleged that he had suffered damage to the amount of £20, for which sum he claimed judgment with costs.

The defendant's agent excepted to the summons on the grounds that the action should have been brought in the name of Mrs. Michler, and not in the name of her husband.

The plaintiff's attorney then applied for an amendment of the summons; the defendant's agent objected to this, and the application was refused.

The Magistrate sustained the exception to the summons, relying on section 51 of Act 20 of 1856, *Snook* v. *Bosman* (2 E.D.C., 201), and *Jackson* v. *Humphries* (4 C.L.J., 284). The plaintiff now appealed.

Mr. Sheil in support of the appeal: The Resident Magistrate clearly erred, as the exception was bad in law.

The 51st section of Act No. 20 of 1856, *Snook* v. *Bosman* and *Jackson* v. *Humphries*, have no application to the present case.

Here a man married in community of property sues for damages for injury done to property belonging to the joint estate, and for the amount

by which the joint estate was damnified by the injuries done to his wife and child, the measure of his damages being the doctors' bills and the loss which he sustained by his wife being rendered unfit to perform her household duties, expenses which must have come out of the joint estate.

On these grounds alone the appeal should be allowed, without considering the further question as to whether a husband can maintain an action for injuries done to his wife and child.

The respondent did not appear.

The Court allowed the appeal.

The Chief Justice said: This case only confirms the remark made in previous cases as to the growing tendency to take the most untenable exceptions in Magistrates' Courts. The action was brought by the plaintiff, as the husband of Henrietta Michler, to whom he is married in community, for damages for injuries done to her and his child and to his property, by reason of the negligent driving of the defendant's servant. Exception was taken to the summons on the ground that the action ought to have been brought in the name of the wife herself and the Magistrate sustained the exception. The cases and the 51st section of Act 20 of 1856 relied upon by him do not support his decision. That section authorises married women under certain specified circumstances to sue without the assistance of their husbands, but it cannot, by the widest construction possible, be understood to prevent the husband married in community to his wife from instituting an action such as the present on their joint behalf. The appeal must be allowed, with costs in this Court and in the Court below, and the case remitted to be tried on its merits.

Their lordships concurred.

[Appellant's Attorney, C. C. Silberbauer.]

RANDALL V. TOWN COUNCIL OF GRAHAM'S TOWN. { 1894. Feb. 16th.

Municipal rate—Water rate—Valuation—Rectification of valuation—Act 12 of 1878—"Premises."

To a claim for Municipal rates under Act 12 of 1878 the defence in the Magistrate's court was that the valuation of the plot of land in question included a wooden building which was movable.

Held, *affirming the decision of the Magistrate's Court, that the valuation was conclusive in that Court and that the proper course for the defendant was, in the first instance, to apply to the Town Council to rectify the valuation, and, if the Council refused, then to apply to a Superior Court for such a rectification.*

To a claim for a water rate on the building under section 9 of Act 12 of 1878 the defence was, inter alia, *that the building formed part of premises owned and occupied by the defendant for which an adequate tank had been provided.*

Held, *that inasmuch as the plot with the building thereon had formerly belonged to a different owner, when a water rate was paid on the building, as the plot is separated from the rest of the defendant's property by a street, and as the building is used as an upholsterer's workshop, it cannot be regarded as part of the premises for which a tank exists and that therefore the water rate is payable.*

This was an appeal from a judgment of the Resident Magistrate for Albany in an action in which the present appellant (defendant in the Court below) was sued for £9 13s. 4d.

The summons alleged:

1. That the defendant was, on the several days on which the rates in the schedule (A) annexed became due and payable, the owner or occupier of certain immovable property situate within the Municipality of Graham's Town, also in said schedule (A) mentioned.

2. That the said rates were on or about the several days, also in the said schedule (A) mentioned, by "The Council of the City of Graham's Town," duly and lawfully assessed and imposed on the said immovable property, and thereupon became due and payable by the defendant on the several days also in the said schedule (A) mentioned.

3. That the defendant was on the several days on which the water rates in the schedule hereto (B) mentioned became due and payable the proprietor and occupier of the said immovable property, with buildings, shop, or store, situate within the Municipality of Graham's Town, also in the schedule (B) mentioned.

4. That the said immovable property, with buildings, shop, or store thereon, situate in Howse-street aforesaid, and on the eastern side thereof, through which street the said Council's main pipes run.

5. That the said water rates were by the said Council duly and lawfully imposed on the said defendant on or about the several days in the said schedule (B) mentioned, and thereupon became due and payable by the defendant on

the days also in the said schedule (B) mentioned.

6. That the rates mentioned in the schedules A and B together amount to the said sum of £9 13s. 4d. sterling, which the defendant refuses to pay.

Wherefore the plaintiffs pray that he may be adjudged to pay the same, with costs of suit.

The defendant filed the following pleas:

1. The defendant denies all the allegations of fact and conclusions of law in the summons contained, and joins issue thereon, and prays for judgment with costs.

2. Should the foregoing be insufficient, the defendant specially pleads that as to the claim in schedule A:

(*a*) That the assessment was illegal and contrary to law, in that the valuator included in his valuation certain movable property, to wit, a movable and portable shed, whereas he ought only to have valued immovable property.

(*b*) That the plaintiff as representing the Mayor, Councillors, and citizens of Graham's Town, holds the sum of 16s. 8d. which was paid by defendant under protest, and which sum is sufficient to pay any claim on the land of defendant exclusive of the movable property thereon.

(*c*) That plaintiff has by retaining the said sum of 16s. 8d. received payment of any rate claimable from defendant.

3. As to the claim in paragraphs 3, 4, 5, 6, in schedule B attached to summons, defendant says that should the first plea be held insufficient:

(*a*) No water rate is payable on the property therein mentioned, because no immovable property is on the land mentioned.

(*b*) Because no main waterpipe runs through what is alleged to be Howse-street, and which is simply a private street.

(*c*) Because defendant's property is on portion of lot 57, and on which lot he has an underground tank of sufficient dimensions to exempt him from water rate, and which tank has been approved of by the Council.

The defendant claims 16s. 8d. from the plaintiff, being for refund of moneys paid under protest for the years 1890 and 1891, and which was illegally charged in respect of certain movable property as alleged by the plaintiff to be in Howse-street, Graham's Town.

The record continues: Plaintiff's attorney joins issue on the first plea. On plea No. 2 the Court has no jurisdiction (see section 71 of Act 23 of 1869). Joins issue on plea 3, the piece of ground is entirely separate from other property of defendant and abuts on the street through which the city's main passes.

Plaintiff excepts to claim in reconvention as not being within the jurisdiction of this Court (section 71 Act 23 of 1869).

Defendant's attorney rejoins. At the time of the valuation defendant was not the owner of the property valued but subsequently acquired the same, and then discovered that the valuator contrary to the provisions of Act 12 of 1878 valued movable instead of immovable property.

Plaintiff's attorney replies that as to the rejoinder the Court has no jurisdiction to try the point raised even if true, which is denied.

In schedule A above referred to a town rate for the years 1892 and 1893, at 16s. 8d. per annum, was charged, and in schedule B a water rate for the years 1890 to 1892, inclusive, at £2 per annum, was charged.

It was admitted that all notices required by the Municipal Acts and regulations had been duly given.

It appeared from the evidence that the property upon which rates were claimed under schedule A was a portable wooden shed under iron room which was screwed on to sneezewood stumps.

The building and the ground upon which it stood were valued in 1889 at £100, no objection to this valuation being raised by the then owner, who subsequently sold the land and building to the present defendant for £70.

The defendant when he discovered the valuation objected, but paid rates for two years under protest; he refused to pay the rates for 1892 and 1893 on the grounds that the building was movable property and not liable to be rated.

As to the claim for water rates under schedule B, the plaintiff's evidence went to show that Howse-street, in which the property is situated, was merely a private street, through which a one-and-a-quarter inch pipe passed, and he contended that inasmuch as he had a registered tank of 4,000 gallons capacity on his property, though on the other side of the street to that on which the shed was situated, he was exempt from paying a water rate in respect of the shed under the 5th Municipal (Water) Regulation.

There was evidence to show that repairs to Howse-street had been effected by the Council, and that water was led down that street from the Council's main in Beaufort-street, and that five persons living in Howse-street had leadings from the one-and-a-quarter inch pipe.

Municipal (Water) Regulation No 5, which was relied upon by the defendant (appellant), was in the following terms:

On every house, building, shop, and store, situated in streets through which the water mains pass, the lowest current water rate shall be payable, except in cases where, in the opinion of the Council, there is sufficient tank accommodation on the premises.

The Magistrate gave judgment for the plaintiffs with costs, credit to be given the defendant for the 16s. 8d.

The following were the Magistrate's reasons:

Defendant, himself a Town Councillor, purchased the property in question with his eyes open. He was himself one of the Councillors who approved of and passed the valuation six months before his purchase.

It was his business to have made himself acquainted with what he was buying, and he cannot now refuse to meet his liabilities for town rates.

The property was valued in 1889 and rates were paid on it up to 1891, the decision of the Town Council in fixing the valuation cannot now be disturbed.

The same remarks hold good with regard to the Water Rates. It seems quite clear that there is a main water-pipe in Howse-street and that the property in question uses the water from the main.

It seems clear to me that the defendant knew the liability on the property when he purchased it. Wherefore judgment is given for the amount claimed with costs.

The claim in reconvention is disallowed, but in a settlement credit will be allowed for 16s. 8d. paid to the Town Council under protest. (Refer to *Wedderburn* v. *Town Council of Graham's Town* (4 E.D.C., 11.)

From this judgment the defendant now appealed.

Mr. Rose-Innes, Q.C., in support of the appeal: The rating of the building was illegal. Only immovable property is ratable (see section 8, Act 12 of 1878), and the Council's valuation cannot be regarded as conclusive. The fact that this structure is a shed or house does not prevent its being movable. The evidence shows that it has already been moved twice, and that at present it is bolted on to sneezewood posts.

Movable houses have been recognised before this, *Kimberley Building Society* v. *Kimberley Borough Council* (7 Juta, 149). See also *Abraham* v. *Isaacs & Co.* (5 Juta, 183) and *Woodfall on Landlord and Tenant* (p. 315.)

Movable houses cannot be valued for rating purposes. See *L. & S. A. Exploration Co.* v. *Beaconsfield Municipality* (3 H.C.R., p. 138).

The Magistrate did not deal with the legal point. He went on the ground that the appellant was a Town Councillor when the valuation roll was approved of, and that he should have known what he was buying, but he did not buy the building until after the roll had been approved of. The Magistrate was wrong in relying on section 71 of the Act 23 of 1869. See *Kimberley Town Council* v. *L. & S. A. Exploration Co.* (2 A C. p. 10).

Section 71 cannot make it legal to value movable property and then rate it.

As to the water rate, it is clear that the rate can only be assessed on immovable property, therefore the same arguments apply as in the case of the building. Howse-street is not a public street and no main runs through it. A one and a quarter inch pipe cannot be regarded as a main pipe within Regulation 5.

The appeal on both points should be allowed.

Counsel also referred to and discussed *Wedderburn* v. *Graham's Town Council* (4 E.D.C., 11).

Mr. Searle, Q.C., for the respondents, was only heard on the question of the water rate, and relied mainly on Act 12 of 1878, section 9.

Mr. Rose-Innes, Q.C., in reply.

The Court dismissed the appeal.

The Chief Justice said: The Legislature has provided ample protection against over-valuation of ratepayers' property. Provision is made for the appointment of competent appraisers, facilities are provided for the inspection of the valuation roll, and a Court is established, with power to take evidence on oath, for the purpose of deciding any objections that might be raised by the ratepayers. The decision of the Council upon any objection to a valuation is final and conclusive. I agree with Mr. Innes that the decision is not conclusive in the sense that even if property which is not liable to be rated at all has been included in any valuation the owner is absolutely foreclosed from claiming a rectification of the valuation. There may be circumstances under which this Court would order such a rectification, but until this is done, the valuation is the only test of the extent of the ratepayer's liability. The action for general rates in the Court below was founded upon a valuation made four years ago before the defendant became the owner of the plot of ground in question. It does not appear that objection was taken to the valuation before the Valuation Court, but it is certain that the valuation was adopted by the Council and that no higher Court was ever applied to for any order on the Council to rectify the valuation. For two years the defendant paid the general rate under protest, but when sued in the Court below for the third year's rate he raised the objection that a building or shed which is portable and therefore movable had been included in the valuation. It is by no means clear that the building is movable, but assuming that it is, the defendant ought in the first instance to have asked the Council to rectify the valuation, and, if the Council refused, he ought to have applied to a competent Court for

relief. But the Magistrate could not go behind the valuation, and he properly decided that the rate claimed was payable. The next question is somewhat more difficult. The water-rate is claimed under the 9th section of Act No. 12 of 1878, which enacts that "the Council shall have the power to impose the current water-rate on the proprietors or occupiers of all buildings, houses, shops, or stores situated in any street through which the Council's main water pipes run, except where tanks are formed or supplied to hold water adequate for the premises in the estimation of the Council." The Council did impose such a water-rate, which was paid by the former owner of the building in question. The defendant objected to pay on the grounds: (1) that the erection is not such a building, house, or shop as was contemplated by the Act; (2) that it is not situated in a street through which main water pipes run, and (3) that on the property on which the defendant himself resides there is a tank adequate for that property as well as for the plots in question. The facts of the case do not support the two first grounds of objection, but the third is more plausible. If the plot in question were a mere appurtenance to the property on which the defendant resides there would be great force in the argument that it forms part of the premises for which an adequate tank has been supplied. But the plot with the erection in question was formerly separate from the defendant's property and, while it was so separate, a water-rate was paid thereon. Between the plot and the defendant's other property a street runs and the building has been used by the defendant not as a mere appurtenance, such as a coach-house or stable, to his residence but as an upholsterer's workshop. It must therefore, in my opinion, be still treated as a substantial erection in respect of which a water-rate is payable, and not as part of premises for which an adequate tank exists. The appeal must therefore be dismissed, with costs in this Court and in the Court below.

Mr. Justice Buchanan concurred, and pointed out that the decision did not settle the question whether the property was movable or immovable. If it were movable, it ought not to be rated; if immovable, it ought to be rated.

Mr. Justice Upington concurred.

[Appellant's Attorney, G. Montgomery-Walker; Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

CLARK v. TOWN COUNCIL OF CAPE TOWN. { 1894. Feb. 16th.

Town Council—Regulations—Refusal to sanction plans—*Mala fides*—Unreasonableness.

In an application for an order on the Town Council of Cape Town to consent to certain alterations to a house belonging to the applicant according to certain plans submitted to the Council

Held, *that mere unreasonableness on the part of the Council in refusing to sanction the plans would not justify the interference of the Court unless it were proved that the Council as a body was influenced in their refusal by dishonest, fraudulent, or otherwise wholly improper motives.*

This was an application on notice that the respondents be ordered to consent to the alterations and additions proposed to be made to the Royal Hotel, Cape Town, as shown on the plans and specifications submitted to the Council on the 29th December last, or that the petitioner might have such further or other relief as to the Court might seem meet, with costs.

It appeared from the petitioner's affidavit that in March, 1893, he bought the Royal Hotel for £14,000.

That he proposed to practically rebuild the hotel, and with this object in view he had plans and specifications prepared by his architect and forwarded to the City Engineer for his approval. These plans and specifications were returned by the Town Council as approved of.

That subsequently he decided to improve upon his first idea, and to make further alterations in and additions to the premises than those first contemplated by him, and with this object in view had new plans and specifications prepared. These latter plans and specifications were, in conformity to the Municipal Regulations, sent in to the City Engineer for his approval.

Subsequently, after some correspondence had passed, the petitioner and his architect attended at the Town-house and there met the Mayor and the City Engineer, as constituting a sub-committee of the Public Works Committee of the Council, and after discussing the requirements of the Council with regard to the proposed alterations and additions, it was found that the only objections which the sub-committee had to offer were to the construction of certain three bay windows, but finally the Mayor, as the spokesman of the sub-committee, undertook and promised that no objection would be offered by the Council to the plans and specifications, especially as regarded the bay windows, provided the petitioner would agree to accept £500 in full compensation for the removal by the Town Council of the stoep of

petitioner's hotel. This offer was not accepted by the petitioner, although he offered to submit the question of the amount to be paid for the removal of the stoep to arbitration. Further correspondence followed with no satisfactory result, the Council taking up the position that the new plans could not be approved of, as the bay windows proposed to be erected would encroach four feet on the street, and the hotel urinals were located under bedrooms. This latter fact was denied by the petitioner's architect, who alleged that there were no bedrooms above the urinals, and that they would be built and located on the most approved system of modern sanitary science.

As to the windows projecting four feet on the street it was pointed out that the street, at the point where it was proposed to erect the windows, was fifty-three feet six inches wide, whereas at its entrance from Darling-street it was only forty-eight feet wide, and further that the windows would be erected sixteen feet from the pavement.

The petitioner prayed that the respondents might be ordered to consent to the alterations and additions proposed to be made to the hotel, as shown in the second set of plans and specifications submitted to the Council for their approval.

Mr. Rose-Innes, Q.C., for the applicant, pointed out that great powers were entrusted to the Council under Act 44 of 1882, but there was a corresponding degree of responsibility on the Council to exercise their powers *bona fide* and reasonably.

Further, the powers were to be exercised for the benefit of the town and not for the pecuniary benefit of the Council or Corporation.

If the applicant could show that the Council were using their powers in order to obtain some pecuniary benefit the Court would say that their powers were not being exercised in a *bona fide* manner.

Counsel referred to the facts and contended that the Council were only opposing the plans because the applicant would not accept the £200 offered to him as compensation for the removal of his stoep. Under these circumstances it could not be said that the Council were exercising their power reasonably and *bona fide*.

The evidence showed that the Council had no valid grounds for opposing the present application.

Mr. Schreiner, Q.C., for the respondents, was not called upon.

The Chief Justice said: It is not necessary to hear Mr. Schreiner on behalf of the respondent Town Council. In opening the applicant's case Mr. Innes has candidly stated that he cannot hope to succeed unless he proved to the satisfaction of the Court that, in refusing to sanction the plans submitted by the applicant, the Town Council exercised its functions *mala fide* and unreasonably. The only question therefore is whether such proof has been given. The affidavit of the City Engineer is certainly very weak, and its reasoning is not without some flaws, but the utmost it proves is that some members of the Town Council may have been influenced in their action by ulterior motives. But the Town Council, as a body, appears to me to have acted in the honest belief that the construction of a building according to the plans submitted would not be for the advantage of the town. Even, therefore, if this Court considered the refusal to sanction the plans somewhat unreasonable no case for interference has been made. Such interference would only be justifiable if, besides being unreasonable the refusal of the Town Council to sanction the plans had also been induced by dishonest, fraudulent, or otherwise wholly improper motives.

The application must be refused with costs.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Tredgold & Co; Respondents' Attorneys, Messrs. Fairbridge & Arderne.]

WAGNER V. WAGNER. { 1894. Feb. 16th.

This was an action for divorce on the ground of adultery.

Mr. Graham said the parties had come to an arrangement whereby they consented to a judgment for judicial separation under certain terms, and he now moved for a decree of judicial separation under the terms of the consent paper. The main terms were that each party should support himself or herself, the community of goods between them to be dissolved; plaintiff to be allowed to carry on business on her own account as she may think fit; plaintiff also to have custody of the minor child of the marriage. Plaintiff to pay defendant £50 in full settlement of his claim on the joint-estate. Each party to pay his own costs.

The Court, defendant's counsel (Mr. Watermeyer) consenting, gave judgment in terms of the consent paper.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorney, A. C. Nelson.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

HEYDENRYCH V. FARMER. { 1894. Feb. 19th.

Written agreements — Cession—Declaration of rights.

This was an action for a declaration of rights under certain two written agreements.

The declaration alleged that on 19th July, 1886, and at Cape Town, a written agreement was entered into between the plaintiff and one Du Preez, by which, in consideration of certain advances and other considerations, the aid Du Preez ceded and made over, by way of security, to the plaintiff certain judgments for the sum of £3,071 6s. 11d., with interest at 10 per cent., obtained against one David Benjamin in the High Court of the South African Republic, under which a certain two-ninth share of a farm Geelhoutsboom, 220, Lydenburg district, and twenty-seven gold-bearing and other farms, the property of the said Benjamin, had been attached, and which were, in pursuance of such judgment and attachment, thereafter advertised to be sold.

That the defendant was at that time the holder of a general bond for the sum of £35,000, passed in his favour by the said Benjamin on the 18th February, 1885, and registered in the South African Republic.

That on the 9th December, 1887, a written agreement was entered into at Cape Town between the said Du Preez and William George Anderson, jun., of Cape Town, the duly authorised agent of the defendant, by which it was agreed that in consideration of the said Du Preez withdrawing the attachment against Benjamin's farms, and an interdict obtained by Du Preez to cover the same, and promising not to take out an attachment or interdict for twelve months, the defendant guaranteed to obtain for the said Du Preez 1,000 fully paid-up shares in any company that might be floated on the farm Geelhoutsboom, and otherwise known as Mac Mac, for which shares on delivery the said Du Preez was to give credit to the said Benjamin for £1,000, and that as to the balance of the claim of the said Du Preez against the said Benjamin, it should rank *pro rata* with the bond of the defendant over the said Benjamin. (A copy of the agreement was annexed.)

All Du Preez's right and interest under this said agreement was thereafter ceded by him to the plaintiff.

That thereafter one Van Driel claimed the benefit of this agreement under an alleged prior cession from the said Du Preez, and pending legal proceedings between the plaintiff and the said Van Driel, it was agreed on the 22nd January, 1888, by a written agreement entered into between the said Du Preez and the said W. G. Anderson, the duly authorised agent of the defendant, and signed by C. A Anderson, his attorney, that the defendant should not take steps to sequestrate the said Benjamin's estate during the twelve months mentioned in the agreement of the 9th December, 1887 (in which this present agreement was to be read and incorporated), and that in the event of the insolvency of the said Benjamin at any time, the claim of the said Du Preez (which is the claim aforementioned) should rank concurrently with the claim of the defendant against the said Benjamin under his aforementioned bond or otherwise, and that in the event of no company being formed within the twelve months, the claim of the said Du Preez, should he, or any one holding under him wish it, should be in the same position in regard to the defendant, and his claim against the said Benjamin, as it was before the execution of the agreement, and the relative rights of Du Preez and the defendant upon Benjamin's estate should be determined as if no agreement had taken place. (Copy of this agreement was annexed.)

This said agreement was entered into with the knowledge and consent of the said Van Driel, and thereafter, by an award duly made a rule of this honourable Court, it was declared that the cession aforesaid to the plaintiff by the said Du Preez was entitled to precedence over the claim aforesaid made by the said Van Driel, and all the right and title in the agreement of January 22, 1888, was ceded thereafter by the said Du Preez to the plaintiff.

In May, 1889, the estate of the said Du Preez was sequestrated as insolvent, and the plaintiff duly bought all the outstanding claims in the said estate, including the claims aforesaid against the said Benjamin, which have been duly ceded to the plaintiff by the trustee of the insolvent estate of the said Du Preez, and are the property of the plaintiff.

No company was floated upon the said farm Geelhoutsboom, *alias* Mac Mac, and no shares were given to the said Du Preez, or any one holding under him, or to the plaintiff.

The claims originally belonging to the said Du Preez, and now the property of the plaintiff, against the said Benjamin still remain unsatisfied.

A number of the farms attached as alleged in paragraph 2 hereof have since been trans-

ferred to other parties, and on the 29th November, 1892, the said Benjamin passed a special bond in favour of the defendant, which recites that an agreement was entered into on the 7th May, 1892, between the said Benjamin and the defendant, by which the former undertook to pay the sum of £10,000 on the 31st December, 1892, and to find further security; and which mortgages specially the aforesaid two-ninths of the farm Geelhoutsboom, *alias* Mac Mac, 220, Lydenburg district.

The defendant denies the validity of the said agreements, and that either of them is of any force or effect, and claims that he is entitled solely to all the moneys or considerations or benefits that he may receive under the said bonds, whereas the plaintiff claims that the defendant is bound by the said agreements, that he is entitled in priority and preference to the defendant for the payment of his said claim upon all moneys or considerations received under and by virtue of the said special bond, and that he is entitled to rank *pro rata* with the defendant upon all moneys or considerations received by the defendant under and by virtue of his general bond, and that generally he is entitled to have declared his rights as against the defendant under the said agreements, all and every of which the defendant denies.

Wherefore the plaintiff claims:

(*a*) A declaration of his rights under the two agreements of December, 1887, and January, 1888, as against the defendant.

(*b*) Alternative relief, with costs of suit.

The defendant, in his plea, admitted that in July, 1886, Du Preez had obtained certain judgments against Benjamin, and that certain farms had been attached in consequence, but he denied any knowledge of the agreement of the 19th July, 1886.

He admitted the execution by his agent (Anderson) of the agreement of December 7, 1887, and he referred the Court to the terms of the said agreement for its true meaning; he said that the estate of Benjamin still remained unsequestrated, and that no company had up to the present time been floated with the object of exploring or working the said farm Mac Mac, either alone or with other property, as a gold-bearing farm. He denied knowledge of the cession to Heydenrych.

He denied that he or Anderson authorised Fairbridge to sign the agreement dated 22nd January, 1888, and he denied that the terms of that agreement were binding on him, and he said that until April, 1892, he was ignorant of the existence of the said agreement. The defendant further said that Benjamin had undertaken to pay to him the sum of £10,000 in full satisfaction of all his indebtedness to the defendant, which was far more than the sum of £35,000; that the said sum of £10,000 had not yet been satisfied, but the defendant held the said bond upon two-ninths of the farm Geelhoutsboom, together with other securities, only until the said sum of £10,000 should have been satisfied, and as security for the payment by Benjamin of the said sum.

The defendant said that according to the first agreement annexed to the declaration, Du Preez was entitled in respect of his claim in the event of Benjamin's insolvency to rank upon his estate concurrently, as far as the defendant was concerned, with the defendant's claim upon his general bond of £35,000, and he admitted that the plaintiff as cessionary of the claims of the said Du Preez would also be entitled so to rank.

He alleged that he was ready and willing to account to the plaintiff for such proportion of the sum of £10,000, if and when received by him, as the amount of the claim of the said Du Preez bore to the defendant's said bond for £35,000, though he did not admit that he was liable so to account to the plaintiff.

The defendant finally said that the plaintiff's contentions as to the said agreements and their meaning had not been correctly set forth in the declaration, he referred the Court to the matters set forth in his plea as showing his contentions, and he said that the plaintiff was not justified in maintaining this action.

Wherefore he prayed that the plaintiff's claim might be dismissed, with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Searle, Q.C., and Mr. Graham appeared for the plaintiff; Mr. Rose-Innes, Q.C., and Mr. Schreiner, Q.C., for the defendant.

Benjamin G. Heydenrych, plaintiff, deposed: I reside in Cape Town. In July, 1886, I entered into an agreement with Mr. Du Preez, under power of attorney, to manage and liquidate his business. I was to meet all pressing debts and make certain advances. A schedule showing Du Preez's assets was drawn up (schedule produced). Certain judgments obtained by Du Preez in the High Court of the Transvaal against one Benjamin, amounting in all to £3,700, were included in that schedule. At that date the farms had already been attached in execution of these judgments. There were twenty-seven of these farms, and two-ninths of Mac Mac. There was also another judgment which Benjamin had obtained against one Vosman which has been paid. At the end of 1887 the farms were still under attachment. There was a provisional order against Benjamin's estate in June, 1887. I knew of the terms of the first agreement; I was consulted upon it. I went on making advances up to

the date of the sequestration of Du Preez's estate. I was a creditor on Du Preez's estate for between £3,000 and £4,000. I have never been paid that. Afterwards at a public auction I bought all the outstanding claims to protect myself in November, 1889. The first agreement (*a*) was ceded to me on 19th December, 1887. Thereafter I signed the second agreement (*b*) under my general power. One Van Driel claimed to be entitled to rights under those judgments, which he alleged had preference over mine. That is how his name comes to be mentioned in the second agreement. I saw Mr. Fairbridge on the subject. Mr. Fairbridge was acting for Mr. Anderson, who represented Mr. Farmer in this colony. (Agreement (*b*) and award handed in.) On 19th April, 1892, I heard for the first time that Mr. Farmer disputed the agreement (*b*). Du Preez's estate was sequestrated in November, 1889, and about the same time Benjamin passed through Cape Town on his way Home to float a company. I have not been paid anything directly by Benjamin. My claim on 31st May, 1893, was £4,734. (Statement of account handed in.) I think the farms are worth more than my claim. I should like to give my claim for the farms. (Letters read between plaintiff and Mr. Anderson, and plaintiff and Mr. Farmer.) Examination continued: I don't know Mr. Farmer. I have never seen him. When he wrote saying he was leaving by the Spartan, I referred him to my attorneys. I assumed at the time that Mr. Farmer signed the agreement that he took upon himself to work out Benjamin's estate, and save it from insolvency. Mr. Farmer had then a chance to pay me in full and pay himself in full.

Cross-examined by Mr. Innes, Q.C.: Mr. Farmer did not make these promises to me. I assumed he would do what I have said.

Hercules Petrus du Preez, attorney of the Supreme Court, deposed: I ceded the agreement (*a*) to plaintiff. He subsequently bought all the assets in my estate. I negotiated the first agreement myself. Mr. Isaacs had recently returned from London, and the flotation of one of the farms was mooted. That was in the year 1887. Mr. Farmer was then in the Colony. As to the agreement of December, 1887, one thing that stood in the way was Farmer's general bond. I saw Farmer and Isaacs, and a preliminary understanding was come to that if I withdrew the attachment under the judgments Mr. Farmer would be willing to allow me to rank *pro rata* on his bond. Mr. Farmer was interested in the flotation, and I believe Sir James Sivewright and Mr. Isaacs, and Lazarus & Co. Mr. Farmer guaranteed to obtain for me and Mr. Anderson and plaintiff 1,000 shares if the company were floated. The agreement was drawn up by Mr. Fairbridge. I was present. As to the second agreement, Mr. Van Driel set up a claim to the judgment which I did not admit, and after it was stated that I had made this agreement to withdraw proceedings and release the farms, Messrs. Van Zyl & Buissinné, acting for Van Driel, threatened to interdict and prevent us fulfilling our agreement with Farmer, and the end was this second agreement which Mr. Heydenrych signed on my behalf. We tried to preserve our rights by holding over the attachment.

Cross-examined: There was some idea of floating the Mac Mac property, which was then considered a good one. I always looked to Mr. Farmer to make good my claim. Mr. Fairbridge was Benjamin's attorney, and it was the object of us all to stop the estate from being sequestrated.

Mr. George Fairbridge, attorney, deposed: I am a partner in the firm of Fairbridge & Arderne. My father was for many years the legal adviser of Messrs. W. G. Anderson & Co. We have acted for Mr. Farmer in various matters. Mr. Anderson very frequently came to see my father about matters connected with Benjamin, but I don't know what passed. My father died on July 4, 1893.

This concluded the plaintiff's case.

For the defence,

William George Anderson deposed: I know Mr. Farmer. During his absence from the Colony I held his power of attorney, which also included a power of substitution. I never exercised that power in favour of Mr. Fairbridge or anyone else. The second agreement which has been referred to was never submitted to me.

Cross-examined: Mr. Farmer is a partner of our firm. I went to England in April, 1886. I don't think I have forgotten anything that happened in connection with Mr. Fairbridge in January, 1888. Mr. Fairbridge had no power of attorney from me in connection with this matter. I have never repudiated anything Mr. Fairbridge has done on my behalf.

W. M. M. Farmer deposed: These twenty-six gold-bearing farms were not of much value at the time the agreement was entered into. As a matter of fact, I advanced money in 1887 (amounting to at least £400) to pay rates upon them, &c., and prevent their being sacrificed, otherwise they would have been sold by Government. I left for England on 10th or 12th January, 1887, and before leaving I had an important offer from Mr. Du Preez and others. When I got to England, the Mac Mac scheme was abandoned altogether. I subsequently received

a copy of the agreement of December, 1887, from Mr. Anderson. I knew nothing of it before. The sequestration was effected through the bank. The bank took steps on my bond. I was in debt to the bank at the time. Circumstances arose in which they considered it to be advisable in my interests to put this bond in force. I knew nothing about the circumstances. I first heard of the agreement on January, 1888 (*a*), in a letter which I received from Mr. Anderson in April, 1892. As soon as I saw the agreement I wrote saying I knew nothing about it. Mr. Fairbridge was not acting as my attorney at the time. He was acting for Mr. Benjamin after the judgment had been withdrawn. In consequence of the 1887 agreement I heard of certain negotiations. I presume the judgments must have been withdrawn, because it was in 1889 that Mr. Benjamin sent me Home another power of attorney to receive any shares and money that might be coming to him in case the twenty-six farms were floated into a company. That, however, did not succeed. Ultimately Benjamin's estate was provisionally sequestrated by Robarts, Lubbock & Co., bankers in London. That was in 1891. I took steps to get the provisional order extended, and Mr. Benjamin came to England. He laid a statement of his affairs before his solicitors and myself, and made certain proposals. As an outcome of that I entered into the agreement of the 7th May of 1892, which has been put in. In terms of that agreement Mr. Benjamin passed a bond in my favour for £10,000, in discharge of his liabilities to me. I hold the bond still, and will hold it until the £10,000 plus £1,000 mentioned in the agreement have been paid. I have received some money on account, about £5,000; the balance still remains unpaid.

Mr. Justice Upington: Did he pass the bond of £10,000 to you before or after his creditors had decided to agree with you as to what was to be done?—After he had released himself from the sequestration order, and he was in a position to do it, he made a special arrangement with the London creditors. I don't know what it was. At that time Benjamin owed me in cash over £40,000, on which I held a general bond for £35,000. He gave a statement showing his liabilities to be £150,000. I could quite see there was no money to pay the creditors. I was in the want of money, and I said, "If you give me a bond for £10,000 I will release you of all debts to me," and he entered into this arrangement, by which I was to receive the £10,000. I wished to be careful in case there were any further claims, and was anxious to stand by the agreement with Mr. Du Preez. The bond for £10,000 is only a second bond; there is a prior bond. It has been extended from time to time, and up to April, 1894.

Cross-examined by Mr. Searle, Q.C.: Q. These farms had a good prospective value?—A. It all depends. At the time they were not valuable. We were of course anxious to save the estate from sequestration. I advanced some money towards that. I advanced Mr. Lazarus £260, and the Standard Bank advanced for me £196 or £200. I have not been paid either of these amounts. Benjamin went Home in 1892. I was one of his principal creditors. Under the agreement of 7th May, I am entitled to receive shares so long as they don't amount to more than £11,000. The time for payment of this has been extended to April, 1894.

Mr. Searle, Q.C., was heard for the plaintiff, and Mr. Rose-Innes, Q.C., for the defendant.

The Court granted absolution from the instance.

The Chief Justice said: As to the first agreement, I don't understand that the defendant denies that he is bound by it. His conduct throughout shows that he has hitherto considered himself bound by it, and there is no necessity for a declaration of rights on that agreement. As to the second agreement, defendant has all along denied that he is bound by it, and was not aware that it had been entered into until some years afterwards. He was in England at the time when Mr. Fairbridge entered into the agreement, or Mr. Anderson, who holds the general power of attorney. It is not at all clear that it was completed through Mr. Fairbridge's agency. What I think took place was this, that Mr. Fairbridge, who had been employed to enter into the first agreement, thought his services would be needed in the second agreement, and he may have intended to inform Mr. Anderson of the fact that he had entered into this agreement, this he omitted to do and the first defendant heard of this second agreement was when Mr. Anderson wrote to him. After Mr. Farmer had been informed of this agreement he wrote to Mr. Heydenrych repudiating the agency of Mr. Fairbridge altogether. It lay with the plaintiff to show that that agency had been proved. He has failed to do so. Mr. Anderson had a general power of attorney, with power to give substitution, but there is no proof that he gave any power to Mr. Fairbridge. The second agreement cannot therefore be relied upon, nor can plaintiff claim any declaration of rights on that agreement. The second claim is that plaintiff is entitled to priority over defendant for power to settle claims upon all moneys received under or in virtue of the special bonds. Plaintiff has failed to prove he is entitled to any preference over defendant.

The utmost that the first agreement gives him is the right to share *pro rata*, but preference is not anywhere given. What I understand the contention to be is, that Mr. Farmer had no right whatever to take a special bond in the face of the pre-existing general bond. If Mr. Farmer had broken his contract by entering into a special bond, the proper course would be to sue Farmer for breach of his agreement, but it cannot give plaintiff the right to claim preference in respect of anything before it. Therefore the second claim also falls to the ground. The third claim is that the plaintiff is entitled to rank *pro rata* with the defendant upon all moneys or considerations received by defendant under or in virtue of his general bond. This defendant never denied. The words are in the agreement. The important question is, does the right *pro rata* arise here? In my opinion the argument for the defendant is unanswerable. The right can only be taken to arise if there is a *concursus creditorum*. When Mr. Farmer receives his share, then will be the time to claim that the plaintiff should share in the distribution. That time has not arrived, therefore it is not necessary to ask a declaration of rights upon what has not been relied upon. At the same time, I think it would be better that this matter should be settled by plaintiff accepting the reasonable offer made by the defendant, who is prepared to pay over one eleventh share of any amount received by him. If this is accepted, an order to that effect can be made. If it is not accepted, no order can be made. There is one more remark I omitted to make, and that is that a difficulty I find in making any declaration of rights in regard to ranking *pro rata* is that it would be wholly nugatory in the Transvaal Courts. The only question is whether plaintiff will accept the offer.

Mr. Searle, on behalf of the plaintiff, said that he would accept the offer if he were also allowed to proceed against Benjamin.

The Chief Justice said the Court could not make that order, and if the plaintiff elected to proceed against Benjamin the judgment would be absolution from the instance with costs.

Their lordships concurred.

[Plaintiff's Attorney, C. C. de Villiers: Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

IRVINE V. IRVINE. { 1894. Feb. 20th.

This was an action for restitution of conjugal rights, failing which for divorce.

The declaration alleged that the parties were married in 1886, and that the desertion took place in 1889. The prayer was for:

1. A decree of restitution of conjugal rights, failing which a decree of divorce.
2. Forfeiture of benefits by virtue of the marriage in community.
3. Further relief with costs.

Mr. Currey appeared for the plaintiff: the defendant was in default.

Frances Adelaide Irvine, plaintiff, deposed: I was married to defendant at St. Paul's Church, Rondebosch, on 12th June, 1886. After our marriage we lived at Port Elizabeth a year and four months, when my husband left for the Transvaal and sent me home. That was in 1887. He said he had lost his billet at Port Elizabeth. I corresponded with him. I rejoined him five years ago at Vreedaport, in the Free State. He did not want me. He did not say why. He was addicted to drink. I remained three weeks with him. He then sent me home. I returned to Rondebosch. I have not heard from him since. I don't know where he lives. I have some property. He has not supported me since I left Port Elizabeth. He was unkind, but never used personal violence to me. There are no children of the marriage. He was employed by a feather merchant, but had no property when I married him.

The Court granted decree of restitution of conjugal rights, with costs, and ordered the defendant to return to or receive the plaintiff on or before 15th May, 1894, failing which the Court would grant a rule *nisi* calling on defendant to show cause by 31st May why a decree of divorce should not be granted, and why defendant should not forfeit all benefits under the community; personal service to be effected.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

SMALL AND MORGAN V. YOUNG. { 1894. Feb. 20th

Building Contract—Balance of account—Action.

This was an action for £106, instituted by Messrs. Small & Morgan, builders, of Cape Town

and Port Elizabeth, against Captain Young, Harbour Master of Port Elizabeth.

The declaration alleged that in or about the month of September, 1892, a contract was entered into between the plaintiffs and the defendant, in terms of which the plaintiffs undertook to build for the defendant a villa residence in accordance with certain plans and specifications for the sum of £1,500.

That thereafter the plaintiffs did build the said residence, and executed at the request of the defendant certain extra works, additions, and alterations, for which they were entitled to claim payment over and above the sum of £1,500.

The plaintiffs claimed that they were entitled to payment of the sum of £1,579 17s. in respect of all the work and the extras executed by them as aforesaid, but the defendant disputed certain of the items of the said account.

Thereafter, on or about the 5th October, 1893, it was agreed between the plaintiffs and the defendant that the plaintiffs should reduce their claim to the sum of £1,560 for all work executed by them as aforesaid, and that the defendant would pay them the said sum of £1,560 in full satisfaction of any claim made by the plaintiffs in the premises, the plaintiffs undertaking to make certain small alterations then and there specified and agreed upon between the parties.

At the said date the defendant was entitled to credit for the sum of £1,454, being for cash paid and materials supplied to the plaintiffs in or about the execution of the said work, leaving a balance of £106 due to the plaintiffs in respect to the said agreement.

Alternatively the plaintiffs said:

The defendant was indebted to them in the sum of £106, being the balance of account for work and labour done and materials supplied for the benefit and at the request of the defendant between the month of September, 1892, and November, 1893.

The plaintiffs claimed:

(a) Payment of the sum of £106, as aforesaid.

(b) Alternative relief.

(c) Costs of suit.

The defendant specially pleaded that it was agreed that all disputes arising out of the contract should be settled by the defendant's architect.

That upon the plaintiffs' claim being made the defendant referred the matter to the said architect, and in accordance with his decision he tendered to the plaintiffs £68 16s. in full satisfaction of all and every claim of the plaintiffs in respect of the building of the said residence.

The plaintiffs have refused the said tender.

The defendant denied the agreement of the 5th October, 1893, and said that the sum of £68 16s., and no more, was due to the plaintiffs. Wherefore he prayed that the plaintiffs' claim might be dismissed with costs.

The replication was general, save that it admitted the tender which was alleged to be insufficient, and issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., and Mr. Buchanan appeared for the plaintiffs, and Mr. Searle, Q.C., and Mr. Molteno for the defendant.

James Morgan, of the firm of Messrs. Small & Morgan, contractors, Port Elizabeth and Cape Town, deposed: I am at present residing in Cape Town, where we have the contract for the New Post-Office. In September, 1892, a contract was entered into that I should build a villa residence for defendant (Captain Young) for £1,500. (Contract produced.) The building was duly put in hand. I was not in Port Elizabeth all the time it was being erected, but was there off and on while the house was going up. I went round from Cape Town at the beginning of October. The house was then finished and the account was rendered to defendant. I saw Captain Young at his own house on the 5th October. An arrangement was made (which I took down in writing) whereby I was to make certain alterations, and when these were completed he was to settle for £1,560 gross. When I read that over defendant said, "All right, Morgan, that's perfectly satisfactory." Some days afterwards I met him on his pony in the street, and he said he had had a report from his architect (Mr. Mills), which was more in my favour than what we had agreed upon. I said, "Never mind, we had better stand by our agreement." He said he would abide by his architect's decision. In November I went to see him again for a settlement. He again insisted on abiding by the architect's report, and I repeated we had better keep to our former decision. I am unwilling to forego anything, because I have lost on the house. Captain Young knows that perfectly well.

Cross-examined: I had seen Mr. Mills in Cape Town about the middle of September. Mr. Mills told me that he had a letter from Captain Young specifying his objections to the account rendered, and he went through the items with me. I gave my views on these objections. The payments were not made to me personally. The last amount rendered, £100, was paid on October 2. It was paid while the architect was considering the matter. I charged £6 by way of commission on stores ordered by defendant. When Captain Young agreed to pay £1,560 gross, the credits were left unsettled.

Robert Littlejohn, foreman to Mr. Morgan at Port Elizabeth, deposed: I remember the 6th

October, on which day Mr. Morgan told me certain alterations had to be carried out. Mr. Morgan had a note book in his hand, and read out the instructions. The alterations were completed. Captain Young came over about a fortnight afterwards. All the alterations had been carried out, or were being carried out. He made some observations about the painting not getting on.

Mr. Morgan (recalled by the Court): The handles of the doors in the house were broken during Captain Young's occupancy. He had then occupied the house for six months. Most of the items in the accounts were discussed at the meeting on 5th October. All the items which had been in dispute had been discussed before. I understood that meeting to be a final settlement of all disputes.

This closed the plaintiffs' case.

For the defence,

Captain Young (defendant) deposed: I am the harbour master at Port Elizabeth. I admit the contract between Mr. Morgan and myself. I was very particular to exclude extras. I went into the house in April. The work was not complete, several locks and bolts were wanting; parts of the house were cracked in one or two places. I scarcely ever saw Mr. Morgan while the house was going up. His foreman superintended. I got plaintiffs' account in August. I remitted that account, and my own account as I made it, to the architect, Mr. Mills, in order that he might consult Mr. Morgan, who was then in Cape Town. Mr. Mills came to Port Elizabeth on a visit in August, and went over my house. I pointed out the defects. I drew his attention to the extras claimed by Mr. Morgan. Plaintiff came to Port Elizabeth in October, and we had an interview in the street. He made some observations about pending lawsuits, and I remarked fortunately there would be no action between us, owing to the submission of the dispute to Mr. Mills. I invited him to come and see the house. He came. I pointed out the defects—the ceilings, which were gaping—and he said, "Can't we come to some settlement?" I said, "No, it is too late." I told him I had proposed to offer him £1,560, which was a little more than the account I sent in to the architect (£1,547); off that had to come the whole of the deductions, as claimed, amounting to £89. I had paid for the stoves and dresser, and for fixing the stoves. When I quoted £1,560, Morgan took out his pocket-book and wrote something in it. What he wrote I don't know. If he says he read it over to me he says what is untrue. I met him again on 13th October. I told him I had received the architect's award and the account, which was a little more than I had agreed to pay him. I had previously written to the architect asking him for his opinion, reminding him that the door handles were falling off like ripe pears and that Morgan would not be satisfied—if he got an inch he would have an ell. At the second meeting I mentioned to Morgan that the award was £68 6s., and as soon as he finished these little matters he would have his money. He said. "Give me a cheque for £60 and we will cry quits." I would not agree to that. He said the alterations would not cost him £8. I said they would cost me more and would prefer him to finish his work. He then sent the men up to do the work. It was done after a fashion.

Cross-examined by Mr. Innes, Q.C.: When I met him the second time, there was a letter of mine in the architect's hands offering £1,560 as a settlement. I arrived at my £1,547 simply by taking the extras as they appear in the correspondence. I cannot say whether Mr. Morgan wrote in his pocket-book while we were going through the house, or while we were sitting in the drawing-room. I am positive he read nothing out to me. I made no offer to him. I did not show him what I had submitted to the architect.

Francis Charles Mills, architect, deposed: I am at present superintending the erection of the New Post-office. I drew the specifications and plan of Captain Young's house. In September I received from defendant a copy of Morgan's account and Captain Young's objections. After going into the matter, I made out my award for £68 16s., which I advised Captain Young to pay. I have no interest in this dispute.

Cross-examined: The item of the dresser was not mentioned by Morgan, so far as I remember. Mr. Morgan told me that if Captain Young persisted in charging counter-claims, he (Mr. Morgan) would charge for things which he had not then charged for.

By the Court: I can't see how there can be any dispute about the items.

Mr. Innes, Q.C., was heard in support of plaintiffs' case.

Mr. Searle, Q.C., was not called upon.

The Chief Justice, in giving judgment, said: The dispute is not as to the original contract between plaintiff and defendant. By that contract it was arranged that all matters in dispute were to be finally decided by the employer's architect. The employer's architect has in this case decided that the amount of £68 16s. is due by defendant to plaintiff. The plaintiff now says that he is not bound by the architect's decision, inasmuch as on the 5th October an agreement was entered into between himself and the defendant that a fixed amount (£1,560) should be paid to him. The only question

therefore, is whether such an agreement has been clearly proved. I am quite willing to believe that plaintiff himself believed that the agreement was made, but at the same time I am satisfied that the two parties did not agree to the terms specified by plaintiff, at least so far as defendant is concerned. But even if he agreed to pay £1,560, it must have been on the basis of the deduction of counter-claims. The letters to the architect clearly show that. Plaintiff has himself to blame for not making a specific contract at that time: If he had had this agreement reduced to writing no question could have arisen, but it is now impossible to find such an agreement binding upon defendant. For these reasons I am of opinion that there should be judgment for plaintiff for the amount of the award, but the plaintiff will have to pay costs.

Mr. Justice Buchanan concurred, and said this was one of these cases in which parties entering on an agreement relied upon their memories instead of reducing the contract to writing.

Mr. Justice Upington concurred.

The Chief Justice added that even if plaintiff had succeeded, the utmost he would have been entitled to would have been £6 over and above the amount tendered.

Defendant was allowed his expenses from Port Elizabeth as a witness.

[Plaintiffs' Attorney, Gus Trollip; Defendant's Attorneys, Messrs. Van Zyl & Buissinnè.]

DICKSON AND CO. V. LEVY. { 1894. Feb. 20th and 21st.

Summons—Amendment—Appeal—Variance.

Where there is such a variance between the summons and the evidence in a Magistrate's Court case that, without an amendment of the summons, judgment cannot be given for the plaintiff, but no amendment is applied for, he is not entitled on appeal to the Supreme Court against the judgment to obtain such an amendment.

Independently of contract, a false representation causing damage is not actionable unless it is fraudulent, and it would be fraudulent if made recklessly without regard to its truth or falsehood

---

This was an appeal from a decision of the Assistant Resident Magistrate for Richmond in an action in which the present appellants (plaintiffs in the Court below) sued the respondent for £20 damages.

The summons alleged that the defendant, on or about the 14th April, 1893, purchased from the plaintiffs, at their place of business at Port Elizabeth, goods and merchandise to the value of about £600 sterling.

That after the purchase had been made, the defendant instructed the plaintiffs to forward the goods so purchased by train to Richmond-road, and to charge the amount due to the firm of Lieberman, Belstedt & Co., who would settle with plaintiffs.

And the plaintiffs further say that the defendant having been introduced to their stores by one Lieberman, of the said firm of Lieberman, Belstedt & Co., and the defendant telling them that the said firm would pay for the goods so purchased, they believed him (the defendant), and on the strength of such representation forwarded the goods to Richmond-road, and the plaintiffs say that immediately after despatching the goods, they forwarded the invoices to the said Lieberman, Belstedt & Co., but that they declined to pay for the goods, or to be responsible for the purchases of the defendant, and the plaintiffs say that they then communicated with the defendant, and gave him an opportunity of coming to a settlement, but that he failed to do so, so that the plaintiffs were obliged to get the goods back by train to Port Elizabeth, and pay the freight. And the plaintiffs say that by reason of the wrongful and misleading acts of the defendant they have suffered damage to the extent of £20.

The plaintiffs claimed judgment for £20, with costs.

The defendant filed the following plea:

1. The said firm of Dickson & Co. (Limited) contracted with the firm of Lieberman, Belstedt & Co., and accepted the said Lieberman; Belstedt & Co. as their principals, and never recognised nor accepted the said defendant as a principal, which he is ready to verify.

2. And the said defendant says that in or about the month of April last the said firm of Lieberman, Belstedt & Co. promised to support him, and Mr. Lieberman, a partner in the said firm, did thereupon instruct him to choose certain goods from the stores of Dickson & Co. (Limited).

3. That he did choose certain goods at the instance and request of the said Lieberman, to whose firm the said goods were charged by the said Dickson & Co. (Limited), the latter having been previously advised by the said Lieberman so to do, and not at his (defendant's) request or his instructions, but at the request of Mr. Lieberman, one of the said firm of Lieberman, Belstedt & Co.

4. That the said goods were never forwarded

to Richmond-road Station as alleged by plaintiffs, nor did the defendant instruct, as alleged, that the goods should be so forwarded.

5. General issue.

The evidence was very conflicting, the defendant stating that he had bought the goods as the agent of Lieberman. Belstedt and Co., by whom he alleged he was at the time supported, and with the full knowledge and acquiescence of Mr. Lieberman, one of the partners of that firm. This was, however, denied by Mr. Lieberman, who entirely repudiated the defendant's alleged agency and authority to buy on behalf of his firm, and that his firm never had been the defendant's supporters.

The plaintiffs also denied the defendant's statement that he had acted as the agent of Lieberman, Belstedt & Co. in the purchase, although they admitted that they had debited Lieberman, Belstedt & Co. in their books with the amount of the purchase owing to the representations of the defendant.

There was evidence to show that the goods had been forwarded to Graaff-Reinet and not to Richmond-road Station as alleged in the summons.

The Magistrate gave judgment for the defendant, with costs.

The plaintiffs now appealed.

Mr. Schreiner, Q.C., for the appellants applied for leave to amend the summons by alleging that the goods were forwarded to Graaff-Reinet and not to Richmond-road Station.

Mr. Sheil, for the respondent, opposed the application on the ground that the amendment should have been applied for in the Court below.

The Court reserved the question of the amendment.

Mr. Schreiner on the merits contended that the Magistrate was clearly wrong in giving judgment for the defendant, as by his false representation that he was the agent for Lieberman, Belstedt & Co., the plaintiffs had incurred the expense and sustained the damage for which they sued.

Mr. Sheil: The plaintiffs proved no damage. If they sustained damage it was through their own negligence in not ascertaining whether the defendant had Lieberman, Belstedt & Co.'s authority to buy goods in that firm's name.

Mr. Schreiner in reply.

Cur ad vult.

Postea (Februrary 21st).

The Court delivered judgment.

The Chief Justice said The defendant was sued in the Court below for £20 as damages sustained by the plaintiffs by reason of their having to pay railway freight on certain goods (which the defendant had ordered) from Port Elizabeth to Richmond-road and back. The evidence showed that the goods had been sent to Graaff-Reinet and not to Richmond-road, and no application was made to the Court below for leave to amend the summons. This Court has now been asked by the plaintiffs, before considering the appeal on its merits, to allow the amendment, but I am of opinion that this is not a course which ought to be adopted. The proper tribunal to amend the summons was the Magistrate's Court, but this Court must in all material particulars decide upon the summons as it left the lower Court. It is by no means clear that, even if the summons were amended, the plaintiffs would succeed on the merits. Mr. Schreiner, in his able argument, has relied upon the fact that the goods were forwarded to Graaff-Reinet to the defendant's address upon the faith of his having represented to the plaintiffs that the goods would be paid for by the firm of Lieberman, Belstedt & Co Before the goods reached the defendant the plaintiffs discovered that the firm had not authorised the defendant to make the promise on their behalf, and accordingly the plaintiffs directed the goods to be returned to Port Elizabeth. Now it is certain that if the goods had been delivered to the defendant he would have been liable for the price upon the refusal of the firm to pay. He would have been liable as principal, although he may have represented himself as agent for the firm to undertake that they would pay for the goods, upon the principle laid down in *Wright* v. *Williams* (8 Juta, 166). But Mr. Schreiner based his case upon the delict of the defendant in falsely representing that he had the firm's authority to make the promise. The evidence would seem to show that he believed that he had such authority although the firm denied having given it. If the plaintiff honestly believed his representation to be true it cannot be relied upon as a fraudulent representation giving rise to an action for damages. Independently of contract a false representation causing damage is not actionable unless it is fraudulent. If made recklessly without regard to its truth or falsehood it would be fraudulent, but the defendant's honest belief in the truth of his statement is sufficient to negative fraud on his part. To enable the plaintiffs to raise the question of the defendants' liability in another action the Court will alter the judgment into one of absolution from the instance, but the appeal must be dismissed with costs.

Their lordships concurred.

[Appellants' Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorneys, Messrs, Fairbridge & Arderne.]

Re MEYER'S INSOLVENT ESTATE. 1894. Feb. 24th.

Mr. Sheil moved for the appointment of Mr. Harry Gibson and Mr. G. Montgomery-Walker as provisional trustees in the above estate pending the election of trustees.

The Court granted the order as prayed, with leave to the provisional trustees to sell the perishables, but not the live-stock.

Re BIERMAN'S INSOLVENT ESTATE.

On the motion of Mr. Sheil, Mr. G. W. Steytler was appointed provisional trustee in the above estate.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

ODENDAAL V. SWART. 1894. Feb. 22nd.

Mr. Tredgold moved for provisional sentence on a mortgage bond for £150, with interest at the rate of 6 per cent. from 1st November, 1887.

Granted.

MYBURGH'S TRUSTEE V. NEETHLING AND OTHERS.

Mr. Molteno moved for provisional sentence on a mortgage bond for £60, with interest at the rate of 7 per cent. from 1st February, 1891.

Granted.

CILLIERS V. BENADIE.

Mr. Maskew moved for provisional sentence on a promissory note for £50, with interest from 4th November, 1893.

Granted.

PURCELL V. PURVIS.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £150, with interest at the rate of 6 per cent. from 1st July, 1892.

Granted.

MENDELSOHN V. HORN.

Mr. Webber moved for judgment for £96 for goods sold and delivered, with interest from due date.

Granted.

WISDEN AND CO. V. HORN AND CO.

Mr. Sheil moved for provisional sentence on three bills of exchange, for £36 17s. 6d., £36 17s. 5d., and £53 14s. 7d., less £35 7s. 9d. paid on account, with interest from the due dates.

Provisional sentence granted as prayed.

DE SMIT V. AFZELIUS.

Mr. Sheil moved for judgment under rule 329 (*d*) for the sum of £40 10s., less 9s. paid on account, being for rent due to plaintiff by defendant.

Judgment granted.

TOWN COUNCIL OF CAPE TOWN V. DAWES.

Mr. Sheil moved for judgment under rule 329 for the sum of £25 12s. 9d., less £4 paid on account, for rates due by defendant.

Judgment granted.

ADMISSIONS.

Ex parte HOME.

Mr. Sheil moved for the admission of Mr. David Henry Home as a conveyancer.

Mr. Home took the oath, and was duly admitted.

Ex parte LLOYD.

Mr. Joubert moved for the admission of Mr Robert James Powell Lloyd as an attorney-at-law.

Mr. Lloyd's admission was ordered, the oaths to be taken before the Resident Magistrate for Prieska.

REHABILITATION.

On the motion from the Bar, P. W. Bester was granted his rehabilitation.

EADY V. EADY. 1894. Feb. 22nd. „ 23rd.

This was an action for divorce on the ground of adultery. Defendant admitted one act of adultery, but pleaded condonation. He alleged in his plea that his wife had committed adultery, and claimed a decree of divorce and the custody of the eldest child of the marriage.

Mr. Graham for plaintiff; defendant in person.

Mrs. C. L. Eady, plaintiff, deposed: I was married to defendant in May, 1880, in London. We had known each other since I was seven years old. We came out to the Cape in February, 1881. My husband deceived me as to

his position. He was quite penniless six weeks after our marriage. I had to pawn my jewellery and borrow money. On our arrival at the Cape we lived at Port Elizabeth for six months. My eldest child was born on June 18, 1881; my second child on August 8, 1886. My mother stayed with us for some time, but my husband treated her so badly that she was compelled to leave. On leaving Port Elizabeth we moved on to Graaff-Reinet, where my husband obtained a situation. We stayed at Graaff-Reinet two and a half years. He had two or three attacks of fever there, and I nursed him. At the end of 1883 we came down to Cape Town. We lived first at Green Point, and subsequently in Rheede-street and Kloof-street, and from there we went to Union-street. We lived altogether five years in Cape Town, and then my husband proposed that I should take a trip to England. I left for England with my husband's full approval and consent in 1888, taking with me my two children. I stayed in England most of the time with his mother. I remained in England four years. During the first two years my husband wrote to me frequently, and remitted in all £280. He did not contribute any more, and his letters fell off during the latter part of my stay. I wrote often, telling him that I wanted to come back, but he invariably replied that I must not return, as he expected to be Home soon, and we might cross each other on the way. His letters contained warm affection to both our children. I returned to the Cape in April, 1892. My brother brought me out. Mr. Rose was a fellow-passenger. On arriving at Cape Town I joined my husband at a boarding-house. He did not come to my room the first night. I thought it strange. My husband was very morose. He was then travelling for Lennon & Co He carried a revolver and a medicine chest. I was afraid of the revolver. He treated the children very affectionately. We got a house in Buitenkant-street. I took in boarders because I was afraid of my husband. He took spirits. We afterwards moved to a house called Alpine Lodge. Mr. Rose and my brother were then staying at Carnarvon House, and at the suggestion of my brother Rose came and stayed with us. My husband was very friendly with Mr. Rose. In October 30 last I took a house at Observatory-road My husband went to live there with me. It was a large house, and we had boarders. Mr. Rose came there. We went to the house on a Monday. That week I was busy laying carpets and putting the house in order. On the Thursday night of the same week my husband returned from business about ten. I let him in and kissed him, and went upstairs to bed. I understood he had to look at some books. I fell asleep, and on waking about two a.m., I found that my husband was not in the room. Thinking he had fallen asleep over the books, I went downstairs and struck a match. He was not in the dining-room and not in the drawing-room. I passed down the passage, and looking into the servant's bedroom I saw my husband in bed with the servant girl. Thinking that he might have the revolver I rushed upstairs and looked for it, and found it there. I awoke Mr. Rose and said, "For God's sake, Mr. Rose, take and hide that revolver, I have seen my husband in bed with the servant." I then went downstairs again. I struck a match in the passage and my husband simultaneously came out of the servant's bedroom. He fell prone on his face and moaned. He had his pyjamas on. The girl was sitting up in bed, and she was quite unconcerned. I called my husband a wretch and some other names. Then I went upstairs, took my eldest child into my room and locked the door. A few minutes afterwards he followed, swearing violently. He threw some boots over the stairs, kicked the dog, and tried to burst open the door. He went downstairs and broke open the cellar and took out some spirits. About 6.30 a.m., when he was quiet, I allowed him to come into my room. He pulled me into his lap, and in a state of maudlin drunkenness, he asked me what had happened. He took some medicine from his sample case, cratched his arm and rubbed in some cocaine, saying, "That will pull me together." On the Friday night he returned home from town and fell down on the doormat, feigning drunkenness. He afterwards came into the house, but I would not allow him inside my bedroom. On the Saturday he kissed the children, spoke some words with the servant girl in the pantry and left, leaving us to believe that he was not going to return. In consequence of something I heard I locked the back door that night, in order to prevent the servant escaping. That night he returned late, rang the bell violently, and I and all the people in the house rushed on the landing. Mr. Black went on the verandah. My husband asked me to come downstairs and touch his hand, as he was leaving for Johannesburg. I did not care about doing that. He fired a revolver and the bullet very nearly hit Mr. Black. Mr. Rose fired at the wall to frighten him. My husband cried out alleging that I had drugged him and carried him into the servant's room. That was not the truth. I have never misbehaved myself with Mr. Rose or with anyone else.

Cross-examined by defendant: On one occasion you struck me on the face with a book at Green

Point in 1884. After the shooting incident at Observatory-road, I told Detective Easton that you had never ill-used me. I know nothing about our neighbour Inglis. He told me he had seen you in the servant's bed. I believed him. I never asked you to go down to the servant's room on any occasion. Mr. Rose has never been alone with me after midnight. I swear that neither Rose nor I carried you into the servant's room. I never drugged you. I never watched you. I admit I played cards on the night after I discovered your misconduct. I played cards just to show I was not afraid of you. I don't remember asking you if I could have Rose as a boarder. I swear you never forbade me to have him as a boarder. I remember three weeks before the birth of my boy, in 1886, you accused me of undue intimacy with Bomon. You said you had heard our names linked at the bar of a public-house. I told you it was false. I wrote a letter to Bomon at your orders forbidding him the house. Mr. Bomon was the conductor at the theatre. I was training the contraltos for the "Pirates of Pensance." I have done a lot of public singing. Mr. Bomon gave me lessons on the violin in exchange for my services to the chorus. No impropriety ever occurred between us.

Alexander Inglis, residing at Observatory-road, deposed that on the morning of 31st October having occasion to enter by the back of plaintiff's house to make some repairs which had been ordered, he found defendant in his pyjamas with the servant girl in the act of adultery.

Cross-examined: Witness had given evidence in another divorce case. He had deserted his regiment, and had gone under the name of Lawrence.

Alexander Rose deposed: I came out to the Colony about five years ago. The plaintiff was a fellow passenger. I saw very little of her on board ship until two or three days before the end of the voyage. I was a continual visitor at Mrs. Eady's house after arriving at Cape Town. Mr. Escourt, her brother, had introduced me. At his suggestion I took lodgings at Mrs. Eady's house. There were several people boarding there. I accompanied the family to Observatory-road. I remember Thursday evening, 3rd November. I went to bed at 9.30. I heard Mr. Eady come home. I heard no more until Mrs. Eady awoke me. I corroborate Mrs. Eady's account of what occurred. I had never seen Mr. Eady the worse for liquor before. On the Saturday night he alleged I had drugged him and dragged him into the servant's room. That, of course, was not true. I have never been guilty of any impropriety with Mrs. Eady. I am engaged to a young lady in England.

Cross-examined by defendant: I have never passed my arm round Mrs. Eady's waist. I first entered your house as a boarder on 31st July, 1893. You never spoke a cross word to me. You never made any accusation against me until you had been found with the servant. You fired the first shot with the revolver. I fired at a blank wall. The bullet could not possibly have hit you.

By the Court: I went to stay at plaintiff's house on the recommendation of her brother, Mr. Escourt. When I went to the house, Mr. Eady was up-country, but he returned shortly afterwards and greeted me most cordially.

Sydney Escourt, brother of the plaintiff, deposed: I came out out from England on board the Grantully in April, 1892. I paid my sister's passage. I made Rose's acquaintance on the voyage. He saw very little of my sister then. After arriving at Cape Town I suggested to Rose that he should go and stay with me at my sister's. I was detained up-country for a fortnight and Mr. Rose went to Alpine Lodge. When defendant appeared he offered no objection to Rose or to me. I was in England during the shooting incident. I was cabled for twice. When I returned I had several interviews with defendant. In particular I met him on Newlands cricket ground about Christmas. We spoke of this case. He was anxious to bring about a reconciliation. When he saw I was determined to go through with the case he said his name was as good as his wife's, and that if the case went on he would bring a cross action and summons Rose and Bomon as co-respondents, although he did not believe his wife had been unfaithful to him. I have never noticed the slightest impropriety between my sister and Rose.

Frederick Rauh, Moravian missionary, deposed that the servant girl (Betty de Lilly) made a statement to him regarding the occasion of Thursday, November 3.

William Black, a boarder at the house at Observatory, deposed that he gave the defendant in charge because he had fired a revolver, and because he thought Mrs. Eady's life was in danger.

Cross-examined: He had since come to the conclusion that the defendant's revolver must have been charged with blank cartridge.

Johanna Sneede deposed that defendant visited her sister at Mowbray twice. He brought the washing. Her sister was called Lizzie Howard. She had two children. She did not know who the father of these children was. She had been offered a reward by Mr. Escourt if she would tell. Witness was in the room both times the defendant called.

Janet Burrows knew the girl Lizzie Howard, who resided at Carey's Cottages. Witness had seen a man with a black coat and white trousers and black bag, and felt hat drawn over his brows, slip into Lizzie's bedroom. Defendant resembled that man.

Mary Jones, residing at Mowbray, identified Mr. Eady as being the man who had visited Lizzie Howard at Carey's Cottages.

Cross-examined by defendant: Lizzie Howard never did any washing for you. She said the two children were yours. She showed me your photo and said, "That's my husband."

The Chief Justice intimated that it would not be necessary to hear further evidence for plaintiff.

For the defence,

George Edward Jones, gatekeeper at Newlands, was called to say what nickname the witness Inglis went by in his regiment.

The Court disallowed the question.

Thomas Spencer, police-constable, deposed that when Black lodged the charge against defendant he wanted to get the bullet back.

Joseph Harrington, police-constable, Woodstock, deposed that Rose gave information about the shooting incident at the police-station, and stated that he and Mrs. Eady had been watching defendant, and they had caught him in bed with the servant. Mrs. Eady declared she had never been ill-treated by her husband in her life.

Detective Easton, who had examined the house after the shooting incident, said he spoke to Mrs. Eady, and from her he gathered that they had had a very happy married life.

Johanna Sercig, who rented a room at Alpine House, where plaintiff resided, deposed that Rose was a frequent visitor at the house in the absence of defendant. Witness thought he was Mrs. Eady's husband. He was in the house after midnight. He was there morning, afternoon, and evening. She had never seen Rose in Mrs. Eady's bedroom, but she had heard from Mrs. Eady's daughter that he was there. Rose did not come so often when defendant was at home. On one occasion Rose stayed all night at the house.

Cross-examined: I am a dressmaker. When I left the boarding-house, I wrote, through an interpreter, threatening if an account were not paid I would expose plaintiff's name all over the Colony.

Christina Allan, who rented from Mrs. Eady two outside rooms of a cottage in June, 1893, deposed that Mr. Rose was a frequent visitor at the house.

By the Court: Witness could not say if Rose stayed late. Mrs. Eady was always most respectable.

Dora October deposed that in 1885 she was a servant in plaintiff's house. When defendant was travelling, Mr. Bomon was almost a nightly visitor. On one occasion witness entered the room suddenly and found Mrs. Eady sitting on Bomon's lap. She had been accustomed to take letters from Mrs. Eady to Bomon. He gave her 5s. and witness handed the money to Mrs. Eady.

Cross-examined: She had never told anyone about this, save Mrs. Eady. She had kept it a secret for eight years. She did not know that Mr. Bomon was engaged at the theatre every night.

Betty de Lilly, general servant in the employment of Mrs. Eady in October last, deposed that she always thought Rose was Mrs. Eady's husband. She had seen Rose with his arm round her waist. As regarded the incident of 3rd November, witness never knew that defendant was in her room. Witness was never guilty of any impropriety whatever with defendant.

Cross-examined: Mr. Eady showed me how to make a fire on the morning of the 31st October. He also kissed me, and asked me how it was I could not get up a fire. I did not like him to kiss me. I said I would tell the mistress. but I did not tell her. I was dismissed by the mistress. I never told Mr. Rauh that the mistress had sent me away because the master had been found in my bedroom.

Betty de Lilly (recalled), in answer to Mr. Graham, said that after she had seen Mr. Eady she gave Mr. Rauh quite a different account of what occurred on November 3.

Mr. John L. Cobbin deposed that he was a friend of the Eady family when they lived in Kloof-street in 1885. He considered that Bomon was not on sufficiently intimate terms with the family to visit at the house when defendant was absent.

Elizabeth Howard deposed that she first met defendant in 1888. When he went to Johannesburg he sent down for her to act as cook, wash his clothes, and assist in the store when required. She was to get £3 a month. When defendant discovered her condition he dismissed her. She went to Pretoria. A man in Johannesburg was the father of her child. She subsequently returned to Johannesburg, where she rented a small house. Defendant paid her £3 a week for his meals. He never slept there, but committed adultery with her some time in 1891. Mrs. Eady told witness she heard about her the day she (Mrs. Eady) arrived in the Colony.

Cross-examined: I was a servant in a boarding-house in Cape Town, where I met the defendant, who was staying there. Defendant

is not the father of either of my children. A man at Johannesburg is the father of my eldest child, and a man at Somerset West Strand is the father of my second child. After my first confinement I returned to Johannesburg and rented a house. Defendant paid me £3 a week for his meals. He frequently did not come for his meals. The rent was £4 a month, which I paid. This arrangement continued until defendant dissolved partnership. While he was sick I nursed him, and while nursing him I misbehaved. That only occurred once. I received money in the shape of post-office orders from Mr. Eady from time to time. That was money due to me for board at Johannesburg.

Frederick John Eady, defendant, deposed: After Mrs. Eady's arrival from Europe—coming as she did unexpectedly—I went and saw her at the Rudolfs' house. She was not able to stay there, but got accommodation at a neighbouring house. There was not room for me, and she advised me to go to my hotel, which I did. The following night we slept together, and then I made the admission to her that I had committed adultery in her absence. She said, "Well, I never expected you to to be an angel." I was travelling in the country about this time for Messrs. Lennon & Co. In my absence my wife took a large house, Alpine Cottage. I was angry. The house was too large. I could not afford it. Rose had become a boarder. I said nothing, but waited quietly for the development of affairs. Rose behaved in a very suspicious and nasty way. Betty de Lilly then became a servant in the house. I said nothing to Rose, and nothing to Mrs. Eady. When we removed to Observatory-road Rose made himself too familiar with my wife—helping her to put up and assort ornaments, laying carpets, &c. As to the incident of Thursday night, November 3, I regard it as a foul conspiracy. I remember coming home that night. I remember wanting to speak to my wife on the subject of Rose, but she went to bed. I sat down in the dining-room, and poured out some whisky, but forgot to drink it. I went upstairs and put on my pyjamas, and lay down on my wife's bed. I could not go to sleep, so I rose and went downstairs and drank the whisky. I made a few cigarettes, and began to smoke, but in a few minutes I was quite helpless. I can stand a good deal of drink, but that little was too much for me. My wife and Rose knew where my medicine chest was, and my theory is that they must have drugged the whisky. All I remember is that a man came and said, "Come along, you want to sleep," and carried me and laid me on the servant's bed. My head was on the bed, and my feet on the floor. That is the whole truth of the incident. It will be proven in the future. I would never have brought the accusation about the paternity of the second child had my wife not perjured herself in the Magistrate's Court.

Mr. Justice Upington: You were master of your own house, why didn't you say to Mr. Rose, "Get out of my house at the end of the month"? A.—Where would have been the benefit to me unless I could have found out something?

Cross-examined by Mr. Graham: I have been in a state of more or less uncertainty for eight years. I admit having written a letter Home after the birth of my second child, stating that the boy was as good as gold and that he was a wonderful little treasure. The child, nevertheless, was born a month earlier than we expected. My wife never complained of my irregularities. There were only two irregularities, and these were condoned. I admit I kissed the servant girl Betty twice. That was to keep her on my side in case she should be required to give evidence. I swear I never declared to Escourt on the cricket-field at Newlands that though I knew I had not the evidence I would nevertheless blacken my wife's name if she attempted to blacken mine. That is one of the most damnable lies that has ever been told in this Court. As to the incident of Thursday, November 3, I think morphia was the drug used. I was not responsible for any action on my part. The age of the eldest girl is thirteen years, and the age of the boy is eight years.

By the Court: I am willing to take the boy. I have got to love the little fellow. My mother, who lives in England, has an income of from £1,500 to £2,000 a year, and would be glad to keep and educate the children.

Mrs. Eady (recalled), in answer to the Chief Justice, said the evidence given by the girl October was wholly false. I never heard of the woman Howard until this case was coming on. I certainly did not see her when I arrived from England. Should I get a divorce and have the custody of the children, my brother would assist me to support them, and of course I would expect some assistance from my husband.

Valerie Eady, called by the Court, deposed: I never told the witness Sercig that Rose was in the room with my mother. If my father and mother are separated I should prefer to live with my mother. My father has always treated me kindly.

This closed the case.

Defendant addressed the Court on his own behalf. Mr. Graham, for the plaintiff, was not called upon.

The Chief Justice said: The defendant can

have no reason to regret his conducting his own case, because he has conducted it with very great ability. He has called all the witnesses that could be called on his behalf, and he has examined them very fairly, and he has addressed the Court with very great ability indeed. Notwithstanding all that, the conclusion of the Court is adverse to defendant's case. The plaintiff charges defendant with two acts of adultery. As to the first act of adultery defendant admits, at all events, that he committed adultery with the woman Howard. There were more occasions than one, in my opinion, on which he committed adultery with her, but we will take it for granted that there was only one. That is enough for plaintiff's case. Then defendant says that there has been condonation of this single act of adultery. In my opinion the defence of condonation has wholly failed. I am quite satisfied that plaintiff, Mrs. Eady, was not aware of this infidelity until after the shooting case at Observatory-road, and that there was no reconciliation on her part with defendant after she became aware of this act of adultery. Therefore on the first act alone plaintiff must succeed. In regard to the second act of adultery with the girl De Lilly, I fully believe the evidence given by Mrs. Eady, that on the night in question she found her husband and this girl in bed together. They were both asleep, and I cannot believe that any married man who is found in that position with a servant girl can be there for any innocent purpose. Although there was no proof of actual adultery, yet the evidence was quite sufficient to satisfy the Court. Defendant tries to explain the circumstances under which he was found, and has tried to satisfy the Court that he was drugged. I am of opinion there is no reason to believe that either Rose or Mrs. Eady drugged defendant. That was a mere afterthought on his part to explain the position in which he was found. That being so, it is unnecessary to inquire as to whether Inglis is to be believed as to the act of adultery on Thursday morning. There is much force in the argument of defendant that it is exceedingly unlikely that he would have chosen the kitchen for an act of adultery when he could have entered a room quite near. Seeing that Inglis is not a man of unblemished reputation, it would be well to dismiss his evidence without further comment. Defendant admits that he has on some occasions kissed the girl. I don't think it is likely that a master would kiss a coloured servant in that way unless it was with a view to further familiarities than mere kissing. The girl herself has given very contradictory evidence, telling one story to her clergyman and telling another to the Court. Under these circumstances, plaintiff is entitled to a decree of divorce on the ground of defendant's adultery. But he has set up a counter charge to the effect that his wife had been guilty of adultery with one Bomon before the birth of her second child, and afterwards with Rose. With regard to the first counter charge, I think it is to be regretted that defendant should have made such a counter charge, for he has himself in his letters to his wife treated this younger child as his own, and he has never made any specific charge to his wife denying that he was the father of this child. He admits himself that there was condonation on his part of any acts of infidelity on the part of plaintiff with Bomon. and that itself would put him out of court. Although there may have been some indiscretions on the part of Mrs. Eady, there has been no adultery with Bomon as alleged. As to the counter charge of adultery against Rose there is no evidence whatever. There are suspicious circumstances undoubtedly, but suspicious circumstances are not conclusive proof of adultery. Sercig's evidence has not been at all confirmed by the rest of the evidence, and a letter written on behalf of Miss Sercig to Mrs. Eady shows she bore her considerable grudge, showing that this lady's evidence was not to be relied upon. The girl Valerie denied that she ever told Miss Sercig that Rose was in the room with her mother. As to the other acts of familiarity between Rose and plaintiff they certainly don't amount to such acts of familiarity as would lead the Court to believe that there were any improper relations between them. The counter charges of adultery have entirely failed, and plaintiff is therefore entitled to a decree of divorce. The real difficulty with the Court is how to deal with the children. *Prima facie*, defendant is entitled to the custody of the children, but he may by his acts forfeit his rights. He has himself denied the paternity of the younger child, so that he can be left with his mother; and as to the elder child, I don't think the Court could separate her from her mother. It would be against the wish of the child, and we could not well do it, for the adultery of the husband has been established and the adultery of the wife has not been proved, Then as to the allowance, there is no evidence that defendant has any means, and he says if he fails in this case he will not regain his situation. Plaintiff, of course, claims the custody of the children, but there have been on her part some indiscretions which would have been better avoided, and I am not sure that they would be the best example to the children. The Court will, therefore, grant a decree of divorce with costs, plaintiff to have

the custody of the children of the marriage, with leave to defendant at all reasonable times and places to have access to the children; and as to the allowance, leave will be reserved to plaintiff to apply to the Court again.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

SOUTH AFRICAN LOAN AGENCY V. CARSLAW AND KOCH. { 1894. Feb. 23rd.

Mr. Molteno for applicant, and Mr. Searle, Q.C., for respondent.

This was an application to make absolute the rule *nisi* declaring the applicants entitled to receive from the first-named respondent the amount of a certain judgment obtained against him by the respondent Koch, of whose estate applicants are assignees by virtue of an irrevocable power of attorney, dated 24th February, 1893.

After argument,

The Court, with Mr. Searle's consent, ordered that the rule be made absolute pending an action which has been brought by the respondent Koch. That in the meantime leave be given to Carslaw to pay the money into court to abide a further order, respondent Koch undertaking to cancel the bond upon such payment. Costs to be costs in the cause.

IN THE ESTATE OF THE LATE ADRIAAN J. VAN JAARSVELD.

Mr. Maskew moved for leave to the executrix testamentary to raise a sum of money on mortgage of certain farm Wolverkloof, in the district of Wodehouse, the property of the estate, for the purpose of discharging the debts thereof, it being for the benefit of the minor heirs that the land should not be sold.

Granted.

ALBERTS' TRUSTEE V. KAPLAN AND OTHERS.

Mr. Sheil applied on behalf of plaintiff for removal of the suit between the parties for trial at the ensuing Circuit Court for Oudtshoorn, and further, that with the record of the said case shall be forwarded the proceedings in which an interdict was obtained against the respondent Kaplan on January 4, 1893.

Granted.

JOOSTE V. ADAMSTEIN.

Mr. Maskew applied on behalf of defendant for leave to sign judgment against the plaintiff by reason of his failure to proceed with his action in the time required by the rules of Court, and for an order that he do pay the costs of this application.

The Court made the order, but directed that the order would only be issued if the powers of attorney were amended.

Re WOOD BROS.' INSOLVENT ESTATE.

Mr. Tredgold moved for the appointment of a commission to examine certain witnesses with regard to the above insolvent estate, under 65th section of the Ordinance.

The Court granted the application, and appointed the Resident Magistrate of Burghersdorp commissioner.

Ex parte HOPKINS. { 1894. Feb. 23rd.

Minor—Bond—Cancellation—Father and natural guardian.

Where a bond had been passed in favour of a minor, and the mortgagor was anxious to pay the amount of the bond and have it cancelled, the Court authorised the Registrar of Deeds to accept the cancellation of the bond by the minor's father as natural guardian.

The father to invest the amount of the bond for the best interests of his child.

Petition of the father and natural guardian of the minor Daniel Alfred Gabriel Hopkins.

On the 19th February, 1892, a mortgage bond was passed by one Bosse in favour of the minor for the sum of £100 hypothecating certain land, the £100 being the purchase price of the property.

At the time the bond was passed the petitioner's wife was alive, and as the £100 belonged to her, being inherited from her parents, she advanced that amount to Bosse with the intention of benefiting her son (the minor) as an investment for him, and the bond was passed in his favour.

When instructions were given to prepare the bond nothing was said as to the mortgagee being a minor, as the petitioner was under the impression that there was no need to state that fact in the bond, as he as father and natural guardian could at all times assist his minor son in looking after his affairs without any trouble or expense.

Bosse had given notice of payment of the bond and had called upon the petitioner to cancel it in the Deeds Office.

The petitioner's son was still a minor, and the Registrar of Deeds refused to cancel the

bond, and as the petitioner did not appear in the bond as the father and natural guardian, and as such in trust for his minor son, the Registrar refused to accept the petitioner's endorsement of cancellation on the bond.

The petitioner then applied to the Master to have the bond cancelled by him on the petitioner's paying the £100 into the Guardian's Fund to the credit of the minor, but the Master refused to cancel the bond or to accept the money.

The petitioner alleged that he was ready and willing, as soon as the bond could be cancelled, to place the £100 either in the Guardian's Fund or in the Cape Government Savings Bank, or to invest it in such manner as the Court might direct.

The prayer was for an order authorising the petitioner to cancel the bond in his capacity as father and natural guardian of his minor son, and authorising the Registrar of Deeds to accept such cancellation. The petition was referred to the Master and to the Registrar of Deeds. The latter reported that under the circumstances detailed in the petition he had no alternative but to refer the parties to the Court. The Master's report was in the following terms: The question for the consideration of the Court appears to be whether the petitioner, as father and natural guardian of his minor son, is authorised to give a valid consent to the cancellation of the bond, and to receive the amount due thereon on behalf of the minor; and on this point I may refer to the case of *Van Rooyen* v. *Werner* (9 Juta, 425; 2 Sheil, 295). With regard to the reference made to me in the petition, I beg to point out that as the minor is under the natural guardianship of his father I am not called upon and have no right to interfere in the matter (Sec. 6, Ord. 105), nor am I empowered to receive into the Guardian's Fund, or to allow interest on, moneys other than those authorised and required by law to be paid into that fund. (Secs. 27 & 30, Ord. 105.)

Mr. Rose-Innes, Q.C., was heard in support of the application and referred to *Elliott's Trustees* v. *Elliott* (3 Mens., 86) and *Van Rooyen* v. *Werner* (9 Juta, 425; 2 Sheil, 295).

The Court authorised the Registrar of Deeds to accept the cancellation of the bond by the petitioner as father and natural guardian of his minor son.

The father to invest the money to the best interests of his child.

The Court further expressed the opinion that the Registrar of Deeds was quite justified in referring the matter to the Court.

[Petitioner's Attorney, D. Tennant, jun.]

COLONIAL GOVERNMENT v. SCHERMBRUCKER. { 1894. Jan. 12th. Feb. 23rd.

Notary—Protocol—Lost deed—Fine.

Where on an examination of a notary's protocol by the Commissioners it was found that one deed was missing, and the notary could give no satisfactory explanation of its absence further than by alleging that it had been lost or mislaid, the Court ordered him to file in his protocol, within six weeks from the date of the order, a true copy of the deed bearing the full amount of stamps, and stamps amounting to £2 in addition as a fine, and further ordered him to pay the costs of the application to the Court.

This was an application on notice calling upon the respondent to show cause why an order should not be granted requiring him to produce the deed forming No. 88 of his notarial protocol before the Commissioners appointed for the examination of protocols in East Griqualand for the purpose of having the same examined by them on such day and at such place and time as the Court might appoint, and why he should not be ordered to pay the costs of the application.

The Resident Magistrate of Kokstad filed an affidavit in which he alleged that he was one of the Commissioners for the examination of protocols and registers of notaries public in the division of Griqualand East under Government Notice No. 509 of 1889, and that respondent was a notary public practising in the said division.

That on examining the respondent's protocol on 13th June, 1893, the deponent and his co-Commissioner found that three of the deeds entered in respondent's register and numbered respectively 79, 80, and 88 were missing, and that deed No. 90 was improperly stamped.

That the deeds Nos. 79 and 80 were subsequently submitted by respondent for examination, but that he had failed to produce the deed No. 88 although he had been respeately called upon to do so.

The respondent filed an affidavit in which he alleged *inter alia* that the deed No. 88 was an ante-nuptial contract between Frank Hyde and Mary Cox, of Kimberley, and was prepared by him gratuitously for the parties.

That the particulars of the said deed were duly entered in the ordinary manner in his protocol book, and in submitting his deeds for examination he alleged that he specially drew the attention of the Commissioners to the fact that deed No. 88 was lost, there being no attempt on his part to conceal the matter.

That by some oversight this deed was not duly registered within the prescribed period, and as he was leaving Kimberley at the time he requested Messrs. Coghlan & Coghlan to make the requisite application to the High Court for permission to effect registration.

That he believed this had been done and the deed duly and properly registered in the Deeds Registry at Kimberley. That he was still under the impression that deed No. 88 was handed to Messrs. Coghlan & Coghlan for the purposes of the application above referred to, but that that firm had stated that it was not filed with the proceedings in the High Court.

The respondent alleged that he believed the deed was mislaid in passing from hand to hand in connection with the above proceedings, that he had made diligent search and inquiries for the deed but had been unable to trace it.

That his deeds had from time to time been in transit from Kimberley to King William's Town, from thence to Cathcart, thence back to King William's Town, and from there to Butterworth and thence to Mount Frere.

That in many cases he was obliged to leave the packing of his deeds and papers to his clerks and others.

That the Commissioners knew that it was quite beyond his power to produce the deed, as it had been lost.

That to the best of his knowledge and belief the deed had been duly and properly stamped and that this information had been communicated to the Commissioners.

On the 12th January the matter was first brought to the notice of the Court, and it was then postponed for further information as to whether the deed had been registered.

Messrs. Coghlan & Coghlan, of Kimberley, were communicated with, and from the affidavit of one of the partners of that firm it appeared that his firm obtained an order of the High Court on the 12th June, 1890, directing the Registrar of Deeds at Kimberley to register the ante-nuptial contract referred to by the respondent, and that thereafter on the 16th June, 1890, the said contract was duly registered in the Deeds Registry of Kimberley.

The deponent alleged that grosse copies of the contract were registered, but that to the best of his knowledge and belief the original contract was never in his firm's possession. That the said copies were prepared and handed to him by the respondent.

Mr. Giddy for the Government.

Mr. Graham for the respondent.

The Court ordered the respondent to file in his protocol a true copy of the deed stamped with proper stamps, and also stamps to the amount of £2 as a fine, within six weeks, and to pay the costs of the application.

[Attorneys for the Government, J. & H. Reid & Nephew; Attorneys for the Respondent Messrs. Findlay & Tait.]

BLANCKENBERG V. COLONIAL GOVERNMENT. | 1894. Feb. 23rd. March 12th 19th & 20th.

Crown—Prescription—Perpetual quitrent—Freehold.

Prescription runs against the Government in respect of land which can be alienated although the Legislature has fixed certain conditions upon which such alienation shall take place, but there must be clear proof that the occupation has been nec vi, nec clam, nec precario.

If the possessor has occupied the land in the belief that it formed part of another portion of land which he owned on perpetual quitrent tenure the Government would be justified in issuing a title on such tenure instead of freehold.

This was an action for a declaration of rights instituted by the plaintiff against the Hon. John Frost (as Secretary for Agriculture, and as such representing the Government), Whitmore Elliott, Andries Christian Mostert, and Marthinus Stofberg Vink (the three latter being nominal defendants).

The declaration alleged that in the year 1892 the plaintiff purchased from one Durr a piece of land, situate in the Cape Division, adjoining the properties of the defendants Elliott, Mostert, and Vink.

That since the date of the purchase and for a period exceeding forty years the plaintiff and his predecessors in title had used and occupied the said land up to the boundaries of the properties of the defendants Elliott, Mostert, and Vink. (A plan of the land was annexed to the declaration.) That the said land had been occupied by user as of right, and adversely to the right of the said Government *nec vi, nec clam, nec precario*, for a period longer than the period of prescription.

The plaintiff further said that the land transferred to him was marked A, B, K, B, C, D, E, F, G, M, L on the plan, and that the title, with remainder of the land on the said plan, marked B, L, M, G, H, K, was vested in the Government.

The plaintiff said that, by virtue of the facts stated above, he was entitled to all the land

included in the letters A, B, C, D, E, F, G, H, K, A on the plan. The plaintiff prayed:

(*a*) For an order declaring that he was entitled to the said land, and for an order compelling the first-named defendant to issue to him a title deed and diagram of that portion of the property so used and occupied by him as set forth in the declaration.

(*b*) Further relief.

(*c*) Costs of suit against such of the defendants as should appear to oppose the said claim.

The Government in the plea admitted the formal allegations in the declaration, denied that since the date of the purchase and for a period exceeding forty years the plaintiff and his predecessors in title had used and occupied the said land up to the boundaries of the properties of the defendants Elliott, Mostert, and Vink, and put the plaintiff to proof thereof, did not admit the plaintiff's conclusions of law, and prayed that his claim might be dismissed with costs.

The replication was general and issue was joined on these pleadings.

Mr. Graham for the plaintiff.

Mr. Giddy for the Government.

The following evidence was given:

Mr. James C. Bisset states: I am a Government Land Surveyor. I surveyed the piece of ground at Koeberg and framed the plan annexed to the declaration.

I had the titles of the ground marked yellow on the plan (put in.—The grant of 4th April, 1814.)

The plan marked blue is not included in this title but this land is mentioned in the description of the diagram as land of Van der Hoeven, but it is not mentioned in the grant itself. There is a dam on the portion coloured blue. I found the beacons standing on the outside as marked, but there were no inside beacons or traces of any dividing lines. The whole of the ground had been ploughed over as one large field.

Cross-examined: I surveyed the ground about January last for the purposes of this case.

By the Court: I only went by the beacons on the ground. I did not visit the Surveyor-General's office.

Jan Daniel Herold Blanckenberg states: I am plaintiff. I bought the ground in 1892 from Durr. My son acted as my agent in the purchase. I paid £575. When I paid I first heard of the dispute as to the extent. I had it valued before I bought. I got the transfer and found I had only five and a quarter morgen. I bought according to the beacons about fifteen morgen.

Cross-examined: I did not buy, my son bought. I did not buy at per morgen. I had seen the ground before but did not know much about it. The dam was there. I have lime kilns there. I did not cultivate it. I did take action against Durr to get transfer of this land. Mr. Moore had the case. Durr has not given transfer. I left Mr. Moore to look after it.

Daniel Jacobus Blanckenberg states: I am son of last witness and acted as his agent in the purchase. I bought according to five beacons. Durr was in the Transvaal. Griffiths and Van Reenen pointed out the beacons. They had lived on the place and knew it well. Durr dealt with me by letter and telegram. Durr is still in the Transvaal. I had the ground valued by Behr before buying.

Cross-examined: Griffiths acted for Durr or rather assisted Miss Durr. He did not have any title or diagram but he showed the beacons. I don't think he knew the extent. He sold and I bought according to the beacons.

George Griffiths states: I live at Maitland and am aged forty-five years. I know the ground and have known it since I was eight years old. Brockman lived on it then. I lived where Elliott now lives (on the south-west). My father owned it and after that I bought it and had it twenty years. I sold it five years ago. All this time the boundary was line *A—a*. There were five beacons on the whole property. I had a fence made, as Brockman impounded my cattle.

Brockman sowed the ground every year. He is now dead. He died ten or twelve years ago. I first heard it was Government ground since the plaintiff bought it.

I showed young Blanckenberg the beacons. Miss Durr was present. She is the sister of Durr, the seller to Blanckenberg.

Cross-examined: I had Durr's house to hire. I did not act for Durr in the sale.

By the Court: No Government officer ever came on the ground in my time. There was Government ground on the east side. Even then no Government officer ever visited the ground.

Marthinus van Reenen states: I am fifty-three years of age. I lived there sixteen or seventeen years. My son owns what was my property. I have known the property about sixteen or seventeen years. My property did not border on the property in question. Brockman occupied it then. I know the five beacons. Brockman used all the property within these beacons as his own. I never heard it was Government ground till after Blanckenberg bought. I was present when Behr valued the ground and I showed him the beacons. I never occupied the ground. I lived on Brockman's ground for two years and eight months. I was there when

plaintiff bought. I hired from Durr, he let me the whole of the ground within the five beacons and I used it all.

Cross-examined: I occupied up to line *h—a*.

Janet Cornelia Durr states: I am a sister of Durr who sold to plaintiff. I was born on the property and lived there or in the neighbourhood ever since. I am fifty years of age. I recollect when Brockman occupied it. I knew the boundaries then, the five beacons. The beacons stood alongside the run. I know Elliott's property. The line ran from the run to the house between the properties. My brother occupied all the property between the beacons.

I was on the other property when plaintiff came to purchase. Plaintiff bought it as the beacons showed.

Cross-examined: Vink's property was also sold. I don't know what the agreement between my brother and plaintiff was.

Francis Durr states: I am brother of Durr who sold to plaintiff. I have known the property since childhood. I am sixty-five years of age. I knew how it was occupied when plaintiff bought. There were always five beacons. It was always sown. The land ran all along Elliott's property up to the run. I was not present when the beacons were pointed out to plaintiff. I don't know what my brother sold.

By the Court: They were masoned beacons. They always were masoned beacons, repaired from time to time. (The correspondence and telegrams containing the offer and acceptance put in.)

For the defence,

John Templar Horne states: I am Surveyor-General. The provisions of Act 15 of 1887 were discussed. The attempt was made to apply section 14 to this ground. I refused to certify, as the ground was considerably in excess of the ground to which it was sought to annex it.

Application was not made under section 12 or section 6. My own opinion was that it would have been an abuse of the power given to me that a piece of ground fourteen morgen in extent should be annexed to a piece five morgen in extent.

Cross-examined: Notice was given for objections; none were raised. I have no doubt that this land has been occupied for all these years. I would not give the certificate under this section.

According to my reading the land annexed must be smaller in extent than the land to which it is to be annexed.

The notice was not a notice published under the Act. It was published before I gave any certificate.

It was the extent not the question of prescription that I considered.

Mr. Graham: Act 15 of 1887, section 2, provides for the disposal of all Crown lands within the Colony. Here the plaintiff's claim is founded upon prescription which runs against the Crown over lands which the Crown can alienate. *Schoof* v. *Weyer* (5 E.D.C., 33); *Municipality of French Hoek* v. *Hugo* (2 Juta, 248); *Barrington and Others* v. *Colonial Government* (4 Juta 448). The proof of prescription is clear.

Mr Giddy for the Government: The position originally taken up by the Government was that the land could not be granted without a judicial order, as there is no provision in Act 15 of 1887 to meet such a case, the Government being under the impression that the period of prescription has run. Subsequently the plaintiff was put to proof that he and his predecessors in title had occupied adversely to the Crown for thirty years. Prescription has not run since 1860, and previous to that year the period of prescription had not been completed.

Again there is much force in the contention of the Surveyor-General that it was not contemplated by the Act that a large piece of ground like this should be annexed to a comparatively small piece.

Mr. Graham in reply.

Cur ad vult.

Postea (March 20th).

The Court delivered judgment.

The Chief Justice said: The reasons which have always induced this Court to scrutinise very closely every claim to title by prescription as against private individuals apply with still greater force to similar claims against the Government. Crown land is but too often regarded as a kind of Noman's land upon which it is permissible to the neighbours to squat to their heart's content, and unless every requisite of a title by prescription is insisted upon the Court may be deluged with actions like the present. In the present case the Government has practically admitted the facts upon which the plaintiff relies. For much more than thirty years his predecessors in title have been in peaceable, open, undisturbed possession of the land claimed, they have occupied the land as of right within certain defined boundaries, and the plaintiff himself bought it in the full belief that the portion of which he could not obtain registered title forms part of the land to which he had obtained a title. For the Government it has been contended that, inasmuch as the Governor has no power, since 1860, to alienate land except upon certain specified conditions, any right which previously existed to obtain a declaration of right by prescription as against the Crown has been practically done away with. It is not denied that before 1860, at all events, prescription could run against the Crown in respect of

land which was capable of alienation and that the land in question was capable of alienation. But neither the Act of 1860 nor subsequent legislation has enacted that prescription shall no longer run against the Crown. The power of alienation still exists, although conditions upon which such power shall be exercised have been introduced. But the inalienable lands in regard to which the writers say that prescription does not run against the Crown are those State domains, fortified places and public buildings, which cannot be alienated by the Crown upon any condition whatever. I am of opinion, therefore, that a right by prescription has been acquired to the land now in question, and that a declaration must be made accordingly. The plaintiff further prays for an order on the Minister of Agriculture to issue to him a title and diagram of the land, but I gather from the correspondence that the Government will be prepared to issue a grant upon a declaration from this Court that the plaintiff has acquired a right to the land by prescription. Such a declaration would, in my opinion, justify the Government in granting the land either in freehold, if it has been occupied as such, or on perpetual quitrent, if it has been treated by the plaintiff's predecessors as part of the quitrent land owned by them. The costs of the action must be borne by the Government.

Mr. Justice Buchanan concurred.

Mr. Justice Upington: Were it not for the admission on the part of the Crown I should have very grave doubts as to the proof of prescription, but the admission on the part of the Crown is so strong, that, coupled with the writing across the original diagram, it is quite enough to show that the period of prescription has elapsed. But in other cases it would be very difficult to satisfy me that as against the Crown prescription runs unless the proof is of the most positive character.

[Plaintiff's Attorney, W. E. Moore; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. SAMSON GROENEVELD AND OTHERS. | 1894. Feb. 26th.

This case came up for review from the Special Justice of the Peace for Frenchhoek. Samson Groeneveld, Jephta Boonzaibi. Moos Ezaanse, Abel Ezaanse, and Job Ezaanse were tried and found guilty of theft on 22nd February. Moos Ezaanse was sentenced to receive fifteen cuts with a cane, the others to fourteen days' imprisonment with hard labour.

The Chief Justice said: This case has come before me for review from the Special Justice of the Peace for the district of Frenchhoek. There are some irregularities in it. Six men were charged with theft, and before the evidence was closed one of them was called as a witness for the prosecution. They were all found guilty, and the one that was called as a witness (Sam Groenewald) for the prosecution among them, and sentenced. The proper course would have been to have found him guilty on the other evidence and then to have sentenced him, and then taken his evidence. In a note the Magistrate says: "Although the evidence is very meagre, I felt that all the prisoners were guilty; moreover, after accused was flogged he admitted to the gaoler that they were together." Now what I want to know is, how it came about that one of the accused was flogged before the sentence had been confirmed by one of the Judges of the Supreme Court? The matter will be referred to the Special Justice of the Peace for explanation.

BROAD V. SCHULTZ AND SMITH. | 1894. Feb. 26th.

This was an application on notice by the plaintiff for the removal of the above suit to the Circuit Court to be held at Uitenhage on the 6th March next.

Mr. Sheil appeared for the applicant.

Mr. Searle, Q.C., for the respondents.

At the suggestion of the Court the following terms were agreed upon: The interdict of the 12th October last to be discharged. Plaintiff to undertake to cut no wood for three months from date. The case to be tried during the May term in the Supreme Court. Costs to be costs in the cause.

JORDAAN'S TRUSTEE V. FLETCHER AND CO. | 1894. Feb. 26th.

Undue Preference—General bond—Past and future advances—Ordinance 6 of 1843 section 84.

J. *four months before his estate was sequestrated as insolvent, and at a time when he was heavily in debt, passed a general bond in favour of* F. & Co., *to cover past and future advances.*

Held, *in an action by J's trustee against* F. & Co., *to have the bond set aside as an*

undue preference under the 84th section of the Ordinance, that the bond so far as it covered past advances was an undue preference and should be set aside.

This was an action for undue preference, instituted by the trustee in the insolvent estate of Gabriel Jacobus Jordaan, of Langevallie, in the district of Robertson, against Messrs. Fletcher & Co., Cape Town.

The declaration alleged that on the 5th May, 1893, the insolvent, who was then indebted to the defendants in divers sums of money, executed in favour of the defendants a general notarial bond for the sum of £400, which bond was registered in the Deeds Office on the 6th May, 1893.

That on the 2nd September, 1893, the insolvent surrendered his estate as insolvent, and the plaintiff was thereafter duly elected and confirmed as sole trustee in his insolvent estate.

That the defendants proved upon the said estate a claim of £276 18s. 2d., for which amount they claimed a preference by virtue of the bond aforesaid.

That the said bond was executed and made at a time when the insolvent contemplated the sequestration of his estate, and he intended thereby to prefer the defendants before his other creditors.

And the plaintiff said that the said bond was an undue preference of the defendants, and is, and was, null and void in terms of section 84 of the Ordinance 6 of 1843.

The plaintiff claimed:

(*a*) An order declaring that the said bond was an undue preference and null and void as aforesaid, and that the defendants were not entitled to any preference in respect of it.

(*b*) Alternative relief.

(*c*) Costs of suit.

The defendants admitted the formal allegations in the declaration, and especially pleaded that the bond was passed in their favour by Jordaan *bona fide* and in the ordinary course of business, and without any intention on his part unduly to prefer the defendants before his other creditors.

Wherefore they prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., and Mr. Jones for the plaintiff.

Mr. Schreiner, Q.C., and Mr. Webber for the defendants.

Mr. Edward R. Syfret, trustee in the insolvent estate, deposed that the estate was sequestrated in September, 1893. Jordaan had a small business at Robertson and a small farm. He also had the outspan. On 6th May, 1893, witness went down to Robertson and examined the books. They could hardly be called books. They gave no assistance to enable witness to arrive at Jordaan's position. Witness ascertained from the proof of debts that Jordaan was owing £701 11s. 3d. on 6th May. There may have been other debts which may have been paid. The assets realised £231 3s. 2d. To that witness added £77 5s. 6d. in the name of outstanding debts. The total assets were £380 8s. 8d., and the deficiency £393 2s. 7d. The debts proved to date were £819 8s. 5d., which were the liabilities of the insolvent now. The insolvent had passed a bond in favour of Fletcher & Co. (bond and schedules handed in).

Cross-examined by Mr. Schreiner: I went down to Robertson representing the creditors, including Fletcher & Co., to investigate the stock. I had a conversation with the insolvent, and I pressed him to surrender his estate for the benefit of his creditors. He offered 2s. 6d. in the £, and said he was unable to pay more.

The creditors would not accept it. I don't remember that he asked me for time. I heard about certain losses through a storm, and a lawsuit, death of stock, and a transaction in potatoes.

Mr. E. S. Steytler deposed: We are creditors to the amount of £170. Immediately I saw a bond had been passed in favour of Fletcher & Co., I tried to get payment of our account. I saw Mr. Jones, of Fletcher & Co. He gave me to understand that they had been entirely misled as to the position of Jordaan. They were under the impression that they were the sole creditors, and were astonished to hear that we had a considerable claim too. At a subsequent meeting of creditors, Mr. Jones left us under the impression that he had no idea himself that his preference would hold good, and he took us by surprise when he told us lately that he intended to press it.

Cross-examined: The conversation with Mr. Jones took place before the insolvency. We got a payment in cash from Jordaan after 6th May, and gave him additional credit for goods amounting to £20.

This closed plaintiff's case.

For the defence,

Mr. Thomas D. Jones, of the firm of Fletcher & Co., deposed: Jordaan dealt with us for fifteen months before 6th May, 1893. He gave bills, which from time to time had to be renewed. In April, 1893, I caused a letter to be written to him. That letter set forth the amount which he owed us, and in consequence of that he came to town. I had a conversation with him through an interpreter. Jordaan could not speak English,

I understood him to say that he could not pay our account on account of losses he had sustained. I gathered from his conversation that no one was pressing him besides ourselves, and as he seemed an honest man, I said to him, "You owe me about £200, but I will give you a further credit if you agree to pass me a bond." He agreed to do so. I gave him a further credit to the amount of £114. At present we stand creditors to the amount of £256 odd. Nothing was said about insolvency during that interview. Two or three months after the bond was passed, I saw Mr. Steytler, and I said to him, "If the bond is preferent well and good, and if it is not preferent we will abide by it." I am certain the insolvent said he was not much indebted to other firms.

Cross-examined by Mr. Innes, Q.C.: If I had known that the man was hopelessly involved I would not have taken the bond.

G. J. Jordaan, the insolvent, deposed: From time to time I paid off my bills with Fletcher & Co. In November, 1892, I went in for purchasing potatoes. I bought 1,300 bags between that time and February, 1893, and I lost £350 on the transaction. A storm blew my house down, by which I lost considerably. That was before May, 1893. I lost 230 small stock through the drought. I have always understood how I stood in business. On 6th May, 1893, I knew I could not pay my creditors if I were pressed. There were some other creditors besides Fletcher & Co. pressing me. When I had the conversation with Mr. Jones in Cape Town I did not tell him I owed other moneys. The bond was passed at Reid's and I got further credit. I did not think I was going to surrender. After I went home I reflected that should my estate be sequestrated I would by passing the bond put Fletcher & Co. in a better position than the other creditors.

Mr. Schreiner, Q.C., for the defendants: Fletcher & Co. were vigilant creditors and secured themselves in the ordinary course of business without taking an undue advantage of the other creditors. See *De Wet's Trustees* v. *Krynauw & Co.* (Buch, 1879, p. 179). In *Trustees of Wilson and Glynn* v. *Wilson and Standard Bank* (16th December, 1886), special bonds were passed twenty-five days before compulsory sequestration yet the Court believed the insolvent when he said that he did not contemplate sequestration.

Here the general bond was passed some months before sequestration, and Jordaan's evidence goes to show that at the time the bond was passed he did not contemplate sequestration, nor did he intend to unduly prefer the defendants.

The presumption raised by Act 38 of 1884, section, 8 is rebutted.

The bond should be upheld.

Mr. Rose-Innes, Q.C., for the plaintiff, was not called upon.

The Chief Justice said: So far as the bond was passed in order to secure future credits due by the insolvent to the defendants, it appears to me to have been perfectly *bona fide* and in the ordinary course of business. The amount for which credit was so given was £114 3s. 4d., and to that extent the bond cannot be impeached. The only question that remains is whether for any amount above that the plaintiff has proved that there was an undue preference. In my opinion, it certainly ought not to be in the ordinary course of business that a merchant should take a bond for past advances at a time when the mortgagor was owing large sums of money to other creditors. The question arises whether the insolvent contemplated sequestration of his estate, and intended to unduly prefer the defendants. If that question had arisen before the Act of 1884 was passed, the defendants would probably have succeeded. (His lordship read the section.) The question now is, have the defendants given proof to the contrary? In my opinion they have not. They have left the matter extremely doubtful, but there is not that proof to the contrary which is necessary to rebut the presumption raised by the 8th section of Act 38 of 1884. For these reasons the bond, so far as it covers any amount other than the £114 3s. 4d. previously mentioned, must be set aside. As to the question of costs, the plaintiff having succeeded in his action is entitled to his costs.

Mr. Justice Buchanan concurred, and added: I am clearly of opinion that a general bond for past debts is not a transaction in the ordinary course of business. In no case has such a general bond been sustained, although there have been cases where a special bond has been sustained.

Mr. Justice Upington concurred.

[Plaintiff's Attorneys, Messrs. Findlay & Tait; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

POTGIETER V. VAN DER HEEVER'S EXECUTOR. { 1894. Feb. 26th.

Legacy—*Jus accrescendi*—Intention – Will.

A testatrix bequeathed to her two grandchildren each one hundred morgen of land, situated respectively on the north and south sides of a certain stream "as a homestead and further" certain other land.

One of the legatees died before the testatrix.

The context of the will showed that the other land was intended to be accessory to the homestead.

Held. that the jus accrescendi *did not apply either to the homestead or to the other land bequeathed.*

Special case stated for the determination of the Court in the following terms:

1. The plaintiff is the father and natural guardian of his minor daughter, Johanna Elizabeth Susanna Potgieter. The defendant is the executor testamentary of the estate of the late Elsie Susanna van der Heever.

2. The said Elsie Susanna van der Heever, married out of community of property to Jurgens Abraham van der Heever, executed a will, and thereafter made a codicil to the said will, dated 19th August, 1889. A copy of the said will and codicil is hereunto annexed, marked A.

3. Under the said codicil the said Elsie Susanna van der Heever made the bequest set forth in the following translation from an extract in the codicil, which was in the Dutch language "I hereby declare to bequeath to both my grandchildren, Johanna Elizabeth Susanna Potgieter and Christoffel Alewyn de Bruin, each one hundred morgen of land in the portion of Bosjesman's Poort belonging to me, adjoining the land which is now being sown for a homestead; to the first mentioned that which is situated to the south of the flow of the spring; and to the last mentioned that which is situated to the north of the spring, and further, all the land of Bosjesman's Poort, and of the deducted portion of the remaining extent of the farm Klipfontein or Klipkraal, *alias* Klipkrans, situated in the division of Colesberg, field-cornetcy of Nieuwe Hantam, as transferred to me on the 22nd June, 1886."

4. Thereafter the said Christoffel Alewyn de Bruin died in the year 1890, and the said Elsie Susanna van der Heever died in the year 1892. The plaintiff contends that the said Johanna Elizabeth Potgieter is entitled to 200 morgen of land, as specified in the codicil, being portion of the farm Bosjesman's Poort, as well as all the remainder of Bosjesman's Poort, and of the portion of the deducted portion of the remaining extent of the farm Klipfontein, more fully described in the codicil, and subject to the conditions contained therein.

The defendant contends that the said Johanna Elizabeth Potgieter is entitled to only 100 morgen, as specified in the codicil, and one-half of the remaining land above referred to.

Wherefore the parties pray for judgment upon their respective contentions. Or otherwise the parties to this suit pray that this Honourable Court may declare the rights of the plaintiff under the said codicil or grant.

Or such other and alternative relief as to this Court may seem meet.

And also that the Court may order the costs of this case to be paid out of the estate of the late Elsie Susanna van der Heever.

Mr. Graham for plaintiff.

Mr. Schreiner, Q.C., for defendant.

The Chief Justice said: All rules for the interpretation of wills are founded upon the presumed intention of testators. If the testatrix had merely bequeathed a certain farm to her two grandchildren the presumption would have been that she intended the survivor to have the whole farm in case one should predecease the testatrix. But she has bequeathed the two grandchildren each 100 morgen of land, situate respectively to the south and north sides of a certain stream as a homestead and further certain other land. The context clearly shows that the other land was intended to be accessory to the 100 morgen given to each as a homestead. Now as to the homesteads, there is a clear separation of interests. The testatrix has specified the extent and situation of the land given to each as a homestead. Upon the death of either legatee before the testatrix the surviving legatee is not entitled to claim both homesteads. But if the other land was intended to be accessory to the homesteads the testatrix must be held to have intended that the *jus accrescendi* shall not apply to such other land. This is the view contended for by the defendant in the special case, and judgment must be given accordingly.

Their lordships concurred.

[Plaintiff's Attorneys, C. C. de Villiers; Defendant's Attorney, J. H. Hofmeyr.]

DUTHIE V. BENN. { 1894. Feb. 26th.

Dogs—Destruction of—Act 40 of 1889, section 226—Pound Act, 1892, section 26.

The plaintiff's dog having been in a fowl-house was shot by the owner of the land whilst running through an enclosure in which no animals were kept but which was within an outer enclosed place in which the owner's ostriches were kept.

Held, *on appeal, that the owner was not liable in damages for the destruction of the dog.*

This was an appeal from a judgment of the Resident Magistrate for Knysna in an action in

which the present respondent (plaintiff in the lower Court) sued the appellant for £5, the value of a dog belonging to the plaintiff, and which had been shot by the defendant.

The defendant pleaded the general issue.

The evidence showed that the dog was shot whilst it was running in an inner enclosure, in which a house and out-offices were situated, and which was connected with a larger enclosure in which were fields and ostrich camps.

Judgment was given for the plaintiff for the amount claimed with costs.

The following were the Magistrate's reasons.

I do not think that the concluding paragraph of section 226 of Act 40 of 1889, as modified by the sections immediately following, can be held to apply to the present case of the arbitrary shooting of a dog without inquiry as to his ownership.

The case however appears to be one proper for investigation under the provisions of the 26th section of Act 15 of 1892, and if so, the question at issue is whether the enclosure, in which the dog was shot, is such a one as is contemplated by the Act. I think not.

The words of the Act are "in a fenced camp or enclosed place in which there are game or animals." This evidently means a camp or enclosed place set apart for the preservation of game, or the keeping of certain domesticated animals which would be disturbed, frightened, or injured by the intrusion of dogs, and not an enclosed place such as an ordinary enclosed farm yard, in which horses, cattle, pigs, poultry, and even dogs are kept, and which with regard to the other portions of the farm is virtually a common thoroughfare.

The place in which the dog was shot is such a farm yard. The dwelling-house and the fowl-house each surrounded by a little fence of its own, the servants' quarters, stable, cowshed, pigsties, &c., stand within it, and two dogs, one generally chained and the other loose, are kept in it. The camps proper for the keeping of ostriches and cattle adjoin, but lie beyond it, and although quite separate from it, at times communication is thrown open between them and the farm yard.

On the occasion of the shooting of the dog two bitches were fastened in this farm yard, one of them at least was in heat, which attracted the dog shot and others to the place.

If the defendant were justified in shooting this dog, then everyone possessing an enclosure of wire or any other kind of fencing, whether situated within the town or not, would be justified in shooting every dog trespassing within it, whether attracted by other dogs kept in it or not, and I cannot think this to have been the intention or meaning of the framers of the Act.

From this judgment the defendant now appealed.

Mr. Juta, Q.C., A.G., in support of the appeal: The Magistrate was wrong. The defendant was justified in shooting the dog. It was both trespassing in terms of Act 40 of 1889, section 226, and was within an enclosed place where animals were kept in terms of Act 15 of 1892.

The only difficulty is to reconcile the necessity for the 26th section of Act 15 of 1892 with the 226 section of Act 40 of 1889.

Mr. Rose-Innes, Q.C.: Section 226 only applies to districts in which a dog tax is in force.

There is no evidence on the record that such a tax is in force in the Knysna.

The place in which the dog was shot was not an enclosure within the meaning of the Act. The Magistrate's judgment was correct.

The Court allowed the appeal.

The Chief Justice said: The concluding words of the 226th section of Act 40 of 1889 make it lawful for any proprietor or occupier of land situated within a division where a divisional dog tax has been imposed "to destroy any dog found trespassing upon the land owned or occupied by such proprietor or occupier." The following section however limits this right to the case of dogs not in the custody, charge, or possession of some person having a fixed abode. The concluding portion of the 26th section of Act 15 of 1892 applies to every district in the Colony and not to those only in which a dog tax has been imposed. It provides that any dog found trespassing at any time in a fenced camp or enclosed place in which there are game or animals may be destroyed. The question whether the dog in question was in the custody of the owner does not arise in the present case, because the dog was shot whilst trespassing in an enclosed place in which there were animals. The actual shooting took place whilst the dog was running in an enclosure in which no animals were kept, but the dog had just left a fowl-house inside that enclosure, and the enclosure was within an enclosed place in which the defendant's animals were kept. In my opinion the Magistrate erred in deciding that the defendant had no right to shoot the dog and the appeal must be allowed with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

FALCONER v. BEHR AND CO. { 1894. Feb. 27th.

Penalty—Liquidated damages—Conditions of sale—Sale of goods—Magistrate's jurisdiction.

A stipulation in conditions of sale that the purchaser should pay five per cent for collection on non-payment of the price within three days held to be not a penalty, *but reasonable compensation for the seller's risk in employing an agent (if such percentage is payable by the seller to his agent for collection and cannot be recovered by the agent from the purchaser on payment of the amount before issue of summons).*

Upon proof, therefore, that an agent has been so employed for collection, the percentage is claimable by the seller from the purchaser.

Such percentage cannot be included in an illiquid case in a Magistrate's Court for the recovery of the price of goods sold if the amount demanded exceeds £20.

This was an appeal from a judgment of the Assistant Resident Magistrate for Cape Town in an action in which the present respondents (plaintiffs in the lower Court) sued the appellant for the sum of £22 (being the price of certain goods sold by auction subject to certain conditions of sale) and 5 per cent. for collection on the said amount.

The defendant pleaded a tender of the amount demanded, less £1 2s. commission, before issue of summons.

The plaintiff admitted the tender after demand sent, and claimed the sum of £1 2s. for commission, being 5 per cent. payable in terms of the conditions of sale.

The conditions of sale (which were put in) contained, *inter alia*, the following clause:

Purchasers neglecting to call for and discharge their accounts within three days after the sale will be held liable to a charge of 5 per cent. for collecting, and the usual interest on the same.

George Coenraad Behr, the plaintiff, gave the following evidence: I am an auctioneer, residing at Cape Town. I know the defendant in this case. The conditions of sale put in are always read before my sales. The amount for which defendant purchased was due on the 4th December last. The goods sold to the defendant were goods I had to sell on commission. If I don't charge commission (5 per cent.) I shall be out of pocket in paying agents to collect my accounts. If I had accepted the amount tendered I should have had to pay my agent. I always pay agents 5 per cent. so as to recover the amount again.

Cross-examined: I cannot say whether defendant was there when the conditions were read. I cannot swear whether I could collect the amount without spending 5 per cent. I have not yet paid my agent. I have given defendant no consideration for the £1 2s. I have to pay my agent.

Judgment was given for the plaintiff with costs, the following being the Magistrate's reasons:

In this case the defendant admits the whole of the plaintiff's claim as set forth in the summons, excepting the item of £1 2s., being a charge of 5 per cent. for collection, and has tendered the amount so admitted after he received a demand from plaintiff's agent, but before the issue of summons.

The plaintiff declined to accept the tender on the ground that it was insufficient, and that a further sum of £1 2s., being 5 per cent. for commission for collection, should have been tendered.

I find that the conditions of sale provide that purchasers neglecting to call for and discharge their accounts within three days after the sale will be liable to a charge of 5 per cent for collecting. The plaintiff in this case has actually engaged an agent to demand the debt due, and a demand was made on defendant by such agent and therefore, following the principle laid down in the cases of *Swemmer* v. *Behrens* (1 Ros., 15) and *Jones* v. *Rhynhout* (3 Menz., 463), I considered the plaintiff entitled to recover the 5 per cent. for collecting the amount, and accordingly gave judgment for the plaintiff with costs.

From this judgment the defendant now appealed.

Mr. McLachlan in support of the appeal: The Magistrate erred in allowing the claim for £1 2s., as it was a penalty and no proof of damage was given. *Cape Town Town Council* v. *Linder and Others* (6 Juta, 410). See also *Mosenthal* v. *McKinnon* (1 Juta, 235).; *Steytler* v. *Smuts* (1 Menz., 40.)

Again the Magistrate had no jurisdiction to adjudicate upon the claim for £1 2s., his jurisdiction being limited to £100 for goods sold and delivered—Act 43 of 1885, section 5 (*b*).—and he could not entertain a claim for damages as well. Although this objection was not taken

in the Court below it may be taken here. *Riversdale Divisional Council* v. *Pienaar* (3 Juta, 252); *Jordaan* v. *Peters* (Buch. 1879, p. 203); *Abner Major* v. *Maketira* (1 E.D.C., p. 47); *Dicks* v. *Pote* (3 E.D.C., 74).

Mr. Sheil for the respondents: As to the first point taken for the appellant. Apart from the special contract, as embodied in the conditions of sale which existed between the parties, it is clear by our law that it is the duty of the debtor to pay his debt without demand, and if in consequence of his default his creditor has been put to additional expense in recovering the amount of his claim, the debtor is bound to make good the additional expense to which his creditor has been put.

And this is the principle which appears to run through all the cases decided in our Court.

For instance in *Jones* v. *Rhynhout* (3 Menz., 463) the Court held that the plaintiff was entitled to claim out of the penalty stipulated for a fair compensation for the expense he had been put to in attempting to obtain payment of his debt by means of his agent.

That case is on all fours with the present.

Again in *Swemmer* v. *Behrens* (1 Ros. p. 15) the sum claimed for collection was not allowed because there was no proof before the Court that an attempt had been made to collect the debt, the inference being that if such an attempt had been proved the commission charged for collection would have been allowed. *Mosenthal* v. *McKinnon* (1 Juta, 235) has no application to the present case, as that was a claim on a liquid document for provisional sentence, and the Court held that the penalty of £20 which had been stipulated for was not liquid.

And in *Cape Town Town Council* v. *Linder and Others* (6 Juta, 410) the Court overruled an exception taken to the plea on the grounds that the clause of contract relating to the £500 was intended as a penal stipulation and that therefore the Town Council could not recover without proof of damage. *Steytler* v. *Smuts* was also a provisional claim.

As to the question of jurisdiction. There was practically a consolidation of the two causes of action, each claim being within the Magistrate's jurisdiction.

Mr. McLachlan in reply.

The Chief Justice said: On the merits of this case the real question is whether the stipulation that the defendant, as purchaser, should be liable to pay five per cent for collection on non-payment of the price within three days after the sale was intended as a penalty or as the reasonable compensation contemplated by the parties for the seller's risk in employing an agent to collect the price. In my opinion it was not intended as a penalty. The agent's commission for collection would be five per cent payable by his employer, and this percentage cannot be charged by the agent to the debtor if the amount is paid before issue of summons. As soon, therefore, as the risk of paying the five per cent. was incurred by the plaintiff the stipulation that the defendant should compensate him for the risk became operative. It is quite true that provisional sentence has frequently been refused for such a percentage stipulated for in liquid documents, but that has been mainly on the ground that oral evidence would be necessary to prove that the stipulation had become operative. In the present case the plaintiff did in part employ an agent to collect the price, and the Magistrate therefore properly held that the five per cent. became payable as the reasonable compensation contemplated by the parties. The percentage cannot however be considered as part of the price so as to give the Magistrate jurisdiction to entertain a suit for an amount in excess of £20. So far as the price exceeds that amount and does not exceed £100 he has jurisdiction—but so far as the excess over £20 includes anything not forming part of the price he has no jurisdiction. The objection was not raised in the Court below, and having now been taken here we must give effect to it. But the objection ought to have been taken in the Court below and the defendant will not be entitled to his costs of appeal. The appeal will be allowed to this extent only, that there will be absolution from the instance as to the sum of £1 2s., but there will be no order as to costs of appeal.

Their lordships concurred.

[Appellants' Attorneys, Messrs. Sauer & Standen; Respondent's Attorney, W. E. Moore.]

BAYLY V. BAYLY. { 1894. Feb. 27th.

This was an action for restitution of conjugal rights, failing which for divorce, on the ground of defendant's alleged malicious desertion.

Mr. McLachlan for plaintiff; defendant in default.

Mary Elizabeth Bayly, plaintiff, deposed: I was married to my husband, who is a journalist, on 22nd March, 1878, at S. Paul's, Port Elizabeth. We lived very happily for the first twelve months, when he began to leave the house at intervals. He sometimes remained away three weeks; sometimes three months. In October, 1891, he finally left me, and I have not heard from him or seen him since. There are two children of the marriage—both girls—one aged fourteen and one aged nine. Defendant has not

contributed to their support, and I want the custody of the children.

The Court granted a decree for restitution of conjugal rights with costs; ordered defendant to return to or receive plaintiff on or before 15th April, failing which, defendant called upon to show cause by 1st May why a decree of divorce should not be granted; personal service to be effected, and plaintiff meanwhile to have custody of the children.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

OPPENHEIMER V. STEEL. { 1894. Feb. 28th.

Mr. Buchanan moved for the final adjudication of defendant's estate.

Granted.

EILENBERG V. BEYERS.

Mr. Tredgold moved for provisional sentence on a promissory note for £63, with interest from due date.

Granted.

PURCELL V. PURVIS.

Mr. Benjamin moved for provisional sentence on a mortgage bond for £650, together with interest from 28th March, 1893, at 6 per cent.

Granted.

Ex parte GARLAKE.

On the motion of Mr. Watermeyer, Rayner Garlake was admitted as an attorney and notary.

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted their rehabilitation: Edward Johnson, jun., and J. L. Kruger.

Ex parte MOLTENO.

Mr. Innes applied on behalf of the executors of the late Sir John Molteno for an interdict preventing Dr. Wright's executors from cutting down certain trees on the boundary of the two properties.

The Chief Justice said it seemed that Dr. Wright was prepared to settle the matter amicably, but the mistake he made was in not desisting when he was approached on the matter. The Court would grant a rule *nisi* returnable on 12th March, calling upon the executors of the late Dr. John Wright to show cause why they should not be restrained from cutting down certain trees mentioned in the petition, pending an action to be brought by petitioners in respect of the boundaries of the property, the rule to operate as an interdict in the meanwhile restraining respondents or anyone else from cutting down the trees.

OLIVER V. OLIVER.

Mr. Webber applied to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties, by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights.

The rule was made absolute.

Counsel also applied for the appointment of a receiver to effect a division of the joint estate.

It was alleged that the defendant was entitled to an inheritance of £400 after the death of his mother.

The Court made no order on this part of the application.

Leave was however given to apply again if necessary.

ROSICH V. ROSICH.

Mr. Buchanan applied for a rule *nisi* requiring the respondent to show cause why applicant, his wife, shall not be admitted to sue him *in forma pauperis* in an action by edictal citation for restitution of conjugal rights, failing which for divorce. The respondent he understood was now in New York.

The Court granted the rule *nisi*, to be returnable on 15th May next, one short publication to made in the New York "Herald."

PAXMAN V. PAXMAN.

Mr. Buchanan moved for a rule *nisi* requiring the respondent to show cause why applicant, his wife, should not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

The Court made the rule returnable on 15th May, and ordered one publication in the "Daily Telegraph."

LEEN V. LEEN.

Mr. Tredgold asked the Court to extend the return day till 12th April, which was granted.

LOURENS V. LOURENS' TRUSTEE.

Mr. Searle applied for an order that the action about to be instituted by applicants, in terms of an order of this Court dated 15th instant, be commenced in the ensuing Circuit Court for Oudtshoorn.

Granted.

BURGHERSDORP REFORMED CHURCH V. COETZEE.

Mr. Sheil applied for extension of the return day of the citation issued by the plaintiffs in the suit between the parties.

The Court ordered the return day to be extended to 12th April next.

DU PREEZ V. VAN COLLER.

Mr. Searle, Q.C., applied for the attachment and sale in execution of a judgment of the Court of Resident Magistrate for Swellendam of certain inheritance which has accrued to the respondent out of the joint estate of the late Petronella M. van Coller and surviving spouse' Adolf J. van Coller.

The Court made the order as prayed in respect of such rights as defendant may have under the will and codicil.

KOCH V. SOUTH AFRICAN LOAN AND MORTGAGE COMPANY.

This was an application by the defendants to purge their default, and for leave to file their plea in the suit between the parties.

Mr. Schreiner, Q.C., and Mr. Graham for applicant; Mr. Searle Q.C., for respondents.

The Court set down the case for trial on the 7th March.

BROAD V. SCHULTZ AND SMITH.

This was an application for the issue of a commission to take the evidence *de bene esse* at Uitenhage of certain witnesses on behalf of the plaintiff.

Mr. Sheil for applicant; Mr. Searle, Q.C., for respondents.

The Court granted the application as craved, and appointed the Resident Magistrate of Uitenhage as commissioner; costs to be costs in the cause.

BEHRENS V. BEHRENS. { 1894. Feb. 28th.

This was an action for restitution of conjugal rights, failing which for divorce.

Mr. Graham for plaintiff; defendant in default.

Catherine Behrens, who gave her evidence on commission before the Resident Magistrate at Peddie, deposed that she was married to defendant, Jacobus Marthines Behrens, on 4th March, 1849. They lived together till 1871, when defendant left for the Diamond-fields, and never returned. There were ten children born of the marriage, and plaintiff had to support them entirely herself. She had inherited 600 morgen of land, and she wished defendant to be excluded from a share in the community if he did not return.

The Court ordered defendant to return to or receive plaintiff on or before 15th May, failing which, granted a rule calling upon defendant to show cause why decree of divorce should not be granted, and why he should not forfeit the benefits of the marriage in community, the rule to be returnable on 31st May; service to be in the same manner as citation.

TYFIELD V. TYFIELD. { 1894. Feb. 28th.

This was an action for divorce instituted by Mrs. Esther Tyfield against her husband, Jacob Tyfield, on the grounds of his adultery with one Mary May.

The declaration alleged that the parties were lawfully married in Adelaide, Australia, on or about the 13th June, 1877, and that the said marriage was still in full legal force and effect.

That there had been issue of the marriage four children, of whom three were still living.

That on or about the 19th day of May, 1890, this Honourable Court granted the plaintiff a decree of judicial separation *a mensa et thoro* from the defendant on the grounds of his cruelty and ill-treatment, and further gave her the custody of the children, the issue of the marriage. That subsequent to the date of the aforesaid decree of judicial separation, to wit, on divers occasions and at divers places between the month of June, 1890, and November, 1893, the defendant wrongfully and unlawfully committed adultery with one Mary May.

That by reason of the premises the plaintiff was entitled to a decree of divorce dissolving the marriage now subsisting between herself and the defendant.

The plaintiff claimed:

(*a*) A decree of divorce.

(*b*) That she might be confirmed in the custody of the surviving children of the marriage.

(*c*) That the defendant might be ordered to contribute monthly towards the maintenance and education of the surviving children of the marriage such sum or sums of money as to the Court might seem meet.

(*d*) Further relief, with costs of suit.

The defendant in his plea admitted the marriage but denied the adultery.

For a claim in reconvention he said that since the date of the order for the judicial separation

referred to in the declaration, the plaintiff had neglected the children of the marriage, and had not taken proper care of them; in consequence of her neglect and improper treatment the youngest child died in or about October, 1893, and the eldest daughter named Fanny had not been sent to school, but was suffered to grow up untaught and uncared for, and had recently commenced to lead an immoral life. He therefore claimed the custody of the surviving children of the marriage.

Issue was joined on these pleadings.

Mr. Sheil appeared for the plaintiff.

The defendant appeared in person.

Esther Tyfield, plaintiff, deposed In May, 1890, I was judicially separated from my husband, and under the order of Court I got the custody of the children, and £100 for their maintenance. I have sent them regularly to school. My eldest daughter has now left school, and is helping me in the shop. The two younger children are still at school. I have never allowed my daughter to go out at night. She is engaged to a young man. She may go out with him occasionally. My youngest child died of typhoid fever in the hospital. Before we were separated my husband ill-treated the children. He struck the eldest girl on the breast, and she had to go to the hospital for two months. My girls are aged sixteen, thirteen, and seven. My business is able to support me. After supporting myself and children, I make about £5 from the business clear profit. I bring this action because my children are growing up, and I don't wish them to have a father whose character is like defendant's.

Cross-examined by the defendant: I did not turn out the eldest girl on the 13th December. She has been leading a perfectly good life.

Dr. Petersen deposed that he attended plaintiff's child last year four times. It was difficult to diagnose whether she was suffering from general tuberculosis or typhoid fever. The child was very much emaciated. He ordered the child to be taken to the hospital.

Anna Cooper, of 55, Bree-street, deposed that on 19th December, 1892, Mr. and Mrs. Tyfield stopped at her boarding-house. The plaintiff was not the "Mrs. Tyfield" who stayed with defendant as his wife.

Fanny Tyfield deposed that she left school about a year and a half ago. She wished to live with her mother. She never went out of a night without her mother's permission. Witness was engaged to be married.

The defendant informed the Court that he had surrendered his estate and was not in a position to contribute anything towards the maintenance of his children.

The Court granted decree of divorce with costs; plaintiff to have custody of the children. No order was made on the prayer for maintenance.

[Plaintiff's Attorney, J. C. de Korte.]

SPOLANDER V. SPOLANDER. { 1894. Feb. 28th.

This was an action for divorce on the grounds of adultery. Mr. Watermeyer for plaintiff; defendant in default.

Andrew Spolander, plaintiff, deposed: My wife's name is Ritty. We were married in March, 1885, and lived in Cape Town and Johannesburg. Later on again we lived in Cape Town. In May last year I ceased to live with my wife. We were in lodgings in Loop-street. She went to Woodstock. I had no suspicion whatever. She was very affectionate when she left. She went off with a sergeant—an orderly clerk at the Castle. I am employed at Richards's. During the session I had to work up to twelve and one o'clock in the morning. My wife must have gone out with the sergeant then. I instructed a detective to watch my wife. I have not seen her since she left. There are no children of the marriage.

Mrs. McKellar deposed that she knew defendant. Witness was in her service for some time after the marriage. Defendant was living at Woodstock. She invited witness to stay with her, as she was lonely since Sergeant Halliwell had left. Witness went to defendant's house Halliwell came, and she left. Witness would not stop there when she saw what was going on. Witness informed Mr. Spolander.

Private Detective Loader deposed that he found defendant living with one Halliwell, a sergeant in the 11th Hussars, now employed at the Orderly-room of the Castle. Witness had seen Halliwell entering and leaving the house where defendant was staying in October.

The Court gave a decree of divorce.

Re LEWIN'S INSOLVENT ESTATE.

On the motion of Mr. Graham, Mr. G. W. Steytler and Mr. F. W. B. Wilmott were appointed provisional trustees.

VAN DER HEEVER V. VAN ROOYEN. { 1894. Feb. 28th.

Magistrate's jurisdiction—Splitting of claims—Abandonment of excess—*Res judicata.*

An agreement in the nature of a partnership having been dissolved by mutual consent the plaintiff rendered an account consisting of

different items and showing a debit against the defendant of £239.

The parties then agreed that the defendant should make a promissory note in the plaintiff's favour for £174, *in respect of the undisputed items of the account, and that the balance of* £65 *should be subject to future adjustment.*

To a summons in a Magistrate's Court on the note after it fell due, the defendant excepted on the ground that the plaintiff had split his claims and had not abandoned his claim for the balance of £65.

Held, *overruling the Magistrate's decision, that the exception was bad inasmuch as there was not such a legal connection between the two claims as to render a final judgment on the one capable of being pleaded as* res judicata *in an action on the other.*

This was an appeal from a decision of the Resident Magistrate for Albert in an action in which the present appellant sued the respondent for £174 9s. 11d., with interest from 30th January, 1894, for and by virtue of a certain promissory note made and signed by the defendant in favour of plaintiff or order and payable on the 30th January, 1894.

The defendant excepted to the summons on the grounds of a splitting of claims by plaintiff, that defendant was sued on a promissory note for £174 9s. 11d., and that plaintiff alleged that there was due to him a further sum of £64 17s. 3d., that if the further claim of £64 17s. 3d. was brought the Court would have no jurisdiction.

The Court reserved the exception.

The defendant then put in a contra account for £123 1s. 7d., and alleged that tender had been made of the difference and costs, and that he did not owe the whole amount of £174 9s. 11d.

The evidence went to show that the plaintiff and the defendant had been practically partners in an agency carried on at Molteno.

The partnership was dissolved, and a settlement of accounts arrived at to this extent, that the defendant passed his promissory note to plaintiff for the sum of £174 9s. 11d., and a further sum of £64 17s. 3d., due to the plaintiff, was left open for future settlement, when the defendant should render a contra account of claims which he alleged he had against the plaintiff.

The £64 17s. 3d. was actually deducted by the plaintiff from an amount of £400 which belonged to one Van Zyl, but which he (plaintiff) had received on account of the defendant.

The Magistrate allowed the exception, the following being his reasons:

That the plaintiff split the demand. Before issue of summons plaintiff had demanded the £64 17s. 3d. That the attempted settlement by plaintiff by deducting the £64 17s. 3d. from Mr. Van Zyl's amount was not agreed to by defendant and was not a settlement.

Plaintiff in his evidence admits this when he says, "I got a demand from Mr. Badnall demanding £400 for Mr. Van Zyl. I referred him to Mr. Van Rooyen. I soon got a summons from Mr. Van Zyl for the £64 17s. 3d., which I mean to get out of Mr. Van Rooyen and pay to Mr. Van Zyl." This taken with Exhibit "I" (an undertaking by plaintiff to allow certain items in dispute to stand over for further settlement) shows that the demand was split, as both amounts were due before issue of summons.

And in a note to his reasons the Magistrate added:

"It will be noted even if the exception had not been upheld the Court would have been ousted of its jurisdiction on defendant's claim in reconvention, the *bona fides* of which does not appear *prima facie* to be disputed.

Mr. Graham was heard in support of the appeal, and contended that the Magistrate had erred in holding that there had been a splitting of demands. There were two separate causes of action.

He referred to and cited the following authorities: *Brett* v. *Salimans* (4 Juta, 6); *Steynsburg Municipality* v. *Green* (3 E.D.C., 239)*;

As to the counter claim the Magistrate was clearly wrong in holding that he had no jurisdiction—Act 43 of 1885, section 5 (*b*).

Mr. Molteno for the respondent: The Magistrate was wrong as to the counter claim, but on the merits his ruling was correct. There was a clear splitting of demands, as the promissory note was not a final settlement.

Had judgment been given for the plaintiff he might have pleaded *res judicata* in answer to the defendant's claim.

The facts in this case are wholly different to those in *Municipality of Steynsburg* v. *Green*. As to splitting demands he cited *Benningfield* v. *Duckitt* (3 Menz., 451).

Mr. Graham in reply.

The Court allowed the appeal.

The Chief Justice said: There is no provision in our Resident Magistrates' Courts Acts, as there is in the English County Courts Acts, to prevent the splitting of demands. But I quite accept the decision of the Supreme Court,

---

* See also, *Brunskill* v. *Powell* (19 L. J., N. S., Ex. 362). *Grimbly* v. *Arykoyd* (17 LJ., N.S. Ex. 157. 1 Ex. Rep. 479).—*Rep.*

pronounced as far back as 1835, that one substantive cause of action, exceeding in amount the jurisdiction of the Magistrate's Court, cannot be collusively split into two in order to bring both within such jurisdiction. The practical objection to such a splitting of claims is that judgment given on the one would be *res judicata* in an action on the other. For example, to put a very simple case, a horse having been sold for one hundred guineas the seller sues the purchaser for fifty guineas being part of the price, and having obtained judgment sues him in the Magistrate's Court for the balance of fifty guineas. The defendant in the second action would be entitled to plead *res judicata* on the ground that the parties are the same as in the first action, the subject matter is the same, namely the price, and the cause of action is the same, the breach of contract by refusing to pay the price. To avoid being harassed by such a second action at all the defendant would have been fairly entitled in the first action to insist upon the plaintiff either abandoning the balance altogether or suing for the whole amount in one and the same action in a Court having jurisdiction to adjudicate thereon. To the extent, therefore, to which *res judicata* could be pleaded to an action on one demand after judgment has been given in respect of the other, I fully agree that the splitting of demands cannot be allowed, but, without legislative sanction I am not prepared to go any further. The question of costs is a distinct one. No Court would allow a plaintiff his costs in two actions if he could have the disputes settled in one action, and the Supreme Court has sometimes exercised the power of compelling a plaintiff to amalgamate different suits against the same defendant, although arising out of different causes of action. It does not follow that the bringing of different suits in a Magistrates' Court against the same defendant in respect of separate causes of action can be objected to on the ground of want of jurisdiction. In the present case the cause of action is the defendant's failure to pay his promissory note for £174 after it fell due. At the time when the note was made the plaintiff had rendered an account showing various items of debit against the defendant to the amount of £239, and it was then agreed that the note for £174 should be given in respect of the undisputed items of the account, and that the balance of £65 should be subject to deductions of such sums as the defendant could prove to be owing to him. When the note fell due the present action was brought on the note in the Court below, and the defendant excepted to the summons on the ground that the plaintiff had split his claims and had not abandoned his claim for the balance of £65. In my opinion the Magistrate erred in allowing the exception. There is not, to use the words of the judgment in *Brett v. Saliman* (5 Juta, 6) such a "legal connection" between the claim on the promissory note and the outstanding claim on the balance of the account as to render a final judgment on the one capable of being pleaded as *res judicata* in an action on the other. The very object of the note was to give the plaintiff a distinct cause of action on a liquid document for an undisputed debt, leaving the disputed portion to be adjusted by subsequent arrangement.

The Magistrate, in his reasons, added a postscript that the fact of the defendant having a counter claim for £123 was sufficient to exclude the jurisdiction, but on this point he also erred. The claim in reconvention not being in excess of the amount claimed by the plaintiff in his summons may be adjudicated upon by the Magistrate and has not the effect of ousting his jurisdiction. The appeal must therefore be allowed with costs and the case remitted to the Court below to be tried on its merits.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery-Walker; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

STEYN'S EXECUTORS v. STEYN. } 1894. Mar. 1st.

Collation — Debt — Insolvent's discharge—Intention—Testator—Will.

In the absence of an indication of the testator's intention to the contrary, a debt incurred to him by a child but discharged by reason of such child's insolvency and subsequent rehabilitation must be collated by such child for the purpose of ascertaining the shares of inheritance due to all the testator's children under a will whereby he has appointed them as heirs in equal shares.

A condition "that any sum which may be owing to the testator by his children must first be deducted from their inheritance" does not

by itself afford such an indication of an intention to the contrary.

Special case, stated for the determination of the Court in the following terms:

1. The parties to this suit reside in the district of Riversdale.

2. The plaintiffs are the executors testamentary to the estate of the late Johannes Gillaume Steyn, and sue in such capacity.

The defendant is a son of the late Johannes Gillaume Steyn.

3. In the year 1883 the defendant was indebted to his father in the sum of £249 12s. 9d. upon a certain promissory note made by the defendant in favour of his father, bearing date 11th February, 1882, for certain money lent and advanced by his father to him. Copy of the said note (marked A) is hereunto annexed, with a translation thereof.

4. On the 18th February, 1883, before any portion of the said amount of £249 12s. 9d. had been paid by the defendant to his said father, the defendant surrendered his estate as insolvent.

5. The claim of the said Johannes Gillaume Steyn was duly proved against the insolvent estate of his said son by one Dirk Versfeld, on behalf of one P. B. Borcherds, who was there and then acting as his general agent.

6. On the 18th May, 1885, the defendant obtained his discharge.

7. Thereafter, on the 20th December, 1889, the said Johannes Gillaume Steyne executed his last will and testament, and on the 5th April, 1893, the said Johannes Gillaume Steyn died, leaving the said will unrevoked and of full power.

8. The said will (a copy of which, marked B, together with a translation into the English language, is hereunto annexed) contains a clause, of which the following is a translation:

Now, proceeding to the election of heirs, I declare to call upon, nominate, and appoint as my sole and universal heirs the children begotten of my first and third marriages in equal shares, subject to this condition, however, that any sum which may be owing to me by my children or sons-in-law must first be deducted from their inheritance, which they or their children may be entitled to, and such of all the goods I may die possessed of, movables as well as immovables, acts and credits, inheritances, bequests, nothing excepted, to be accepted and possessed by them, and in case of predecease of one or other of them, then by their legal descendants by representation, as free and own property, without the interference of anyone.

9. At the death of the said Johannes Gillaume Steyn and at the date of the execution of his said will, certain sums of money were owing to him by certain of his children, other than the defendant.

The plaintiffs contend that they are entitled to deduct the said sum of £249 12s. 9d. from the amount of the inheritance accruing to the defendant under the will of the late Johannes Gillaume Steyn and to bring it into collation with the said inheritance, notwithstanding the terms of section 120 of Ordinance 6 of 1843.

The defendant contends that the plaintiffs are not entitled so to deduct the said sum from his inheritance or to bring the said sum into collation, and that the said sum was not owing by him to the deceased Johannes Gillaume Steyn at the date of his death.

Wherefore the parties pray the judgment of this Honourable Court on their respective contentions, and that the costs of this cause may be ordered to come out of the estate of the said Johannes Gillaume Steyn.

Mr. Graham, for the plaintiffs, relied on *Jooste* v. *Jooste* (8 Juta, 288—1 Sheil, 251); *Cen For* (3, 13, 10, 12), (3, 4, 32); *Grotius* (2, 18, 11), (2, 28, 14); *Van Leeuwen* (R.D.L., 3, 5, 4) (3, 16, 1), and contended that in the absence of express provision to the contrary in the testator's will the rule as to collation applied.

Mr. Rose-Innes, Q.C., for the defendant: The law is not disputed, but we contend that the debt was as much extinguished by rehabilitation as if it had actually been paid: Ordinance 6 of 1843 section 120: *Quin Bros.* v. *Van der Merwe* (9 Juta, 217).

The intention of the testator must be looked to (*Voet*, 37, 6, 27). The maxim *expressio unius est exclusio alterius* applies. The note was not long in the testator's possession, it was found filed in the insolvency proceedings.

Mr. Graham in reply referred to *De Villiers* v. *South African Association* (2 Searle, 297).

The Chief Justice said: The clause of the will out of which the present dispute arises reads as follows: "I nominate as my sole and universal heirs the children begotten of my first and third marriages in equal shares; subject to this condition, however, that any sum which may be owing to me by my children or sons-in-law must first be deducted from their inheritance, which they or their children may be entitled to." The plaintiffs are the executors and the defendant is a son of the testator. In 1882 the defendant made a promissory note in favour of the testator for £249 payable on demand for money lent by the testator, in 1883 the defendant became insolvent and the testator proved the note on the estate but received no dividend, in 1885 the defendant received his discharge, in 1889 the testator made the will in

question, and in 1893 he died. The question to be determined is whether the amount of the promissory note must be brought into collation for the purpose of ascertaining the share of the defendant's inheritance. I am clearly of opinion that if no condition had been inserted in the clause of the will appointing the heirs the defendant would have been bound to collate the amount of the note. As was pointed out in *Jooste* v. *Jooste's Executor* (8 Juta. 292), the presumption is that a parent in appointing his children as heirs intended that there should be perfect equality between them. The fact that one of them, to whom he has lent a considerable sum of money, has become insolvent and has since been discharged is certainly not sufficient to rebut such presumption, more especially if the parent has proved his claim upon the insolvent estate and received nothing. So far as the children are concerned the inequality is the same whether the law has or has not wiped out the debt incurred by the one to whom the money has been lent. The real point at issue, therefore, is whether the condition upon which the appointment of heirs was made affords an indication of the testator's desire that there should be no collation of the amount of the promissory note. The argument for the defendant is that by specially providing that any sums which might be owing by his children should be deducted from their inheritances, the testator must be deemed to have confined the deduction to such sums as were legally owing to him at the time when the will was made. Moreover it does not appear from the case stated that the testator knew the fact that the defendant had obtained his discharge. If the testator did not know it his presumed intention that there should be collation has not been rebutted. If he knew the fact, the contention is that he was bound to know the law that rehabilitation discharges an insolvent's debts, but then he was equally bound to know that without a sufficient indication to the contrary his intention would be presumed to be that there should be collation. Such an indication not having been given, the question reserved must be answered in the plaintiffs' favour.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorneys, Messrs. Van Zyl & Buissinne.]

JOOSTE V. PETZER. { 1894. Mar. 1st.

Jurisdiction—Magistrates Court Acts—Set off or compensation — Reconvention — Liquidated demand — Unliquidated damages.

In an action for £2 18s., in respect of money lent the defendant excepted to the jurisdiction on the ground that he had a counter claim for £259, two items of which amounting together to £9 constituted the purchase price of cattle but the remaining items were for unliquidated damages.

Held, *on appeal, that the Magistrate had jurisdiction to decide upon the plaintiff's claim, inasmuch as the items of the counter claim which were capable of being pleaded in compensation were not in excess of his jurisdiction and, being distinct from the other items of the counter claim, could have been claimed in reconvention in this action*

This was an appeal from a decision of the Resident Magistrate for East London, in an action in which the present appellant (plaintiff in the Court below) sued the respondent for the sum of £2 18s., cash advanced to defendant and on his account, to wit, on the 26th July, 1893, £1 10s., and on the 17th November, £1 8s.

Before pleading the defendant excepted to the Magistrate's jurisdiction, on the grounds that he had an illiquid claim against the plaintiff amounting to £259, made up as follows:

1. £6 10s., purchase price of one ox.
2. £2 10s., purchase price of one young ox.
3. £50, the value of certain cattle, the property of the defendant, wrongfully and unlawfully seized by the plaintiff in November last.
4. £100, damages for the said unlawful seizure and for trespass.
5. £100 damages for breach of contract made between the parties in the month of July, 1890, which said claim is in excess of the jurisdiction of the Court.

Wherefore defendant prays that the plaintiff's claim may be dismissed with costs.

The defendant also filed the following plea:

And in case the said exception is disallowed, the defendant denies that the plaintiff at any time lent him the sum of £1 10s., and as to the claim of £1 8s., the defendant says that he has repaid to the plaintiff any sum paid by him on defendant's behalf, and prays that the plaintiff's claim may be dismissed with costs.

And as and for a counter claim he refers to the items set forth in the foregoing exception, and prays that they may be considered as inserted herein.

The plaintiff objected to the counter claim as being beyond the jurisdiction of the Court, and

incapable of being set off against the plaintiff's claim: the Magistrate decided to hear the defendant's evidence as to this counter claim.

The defendant gave his evidence, and produced a cheque for £6 10s., dated 6th July, 1893, alleged to have been given to him by the plaintiff as the purchase price of one ox, which cheque, he stated, the plaintiff asked him not to present at the time it was given, and that he (defendant) afterwards forgot it.

There was nothing on the record to show that the Magistrate refused to allow the plaintiff to rebut the defendant's evidence as to the claims of £6 10s. and £2 10s.

The Magistrate allowed the exception to his jurisdiction, and dismissed the case with costs. The following reasons were given for the judgment: I was satisfied as to the *bona fides* of the counter claim, and was of opinion that it was capable of being set off against the plaintiff's claim in convention.

The plaintiff now appealed.

Mr. Benjamin in support of the appeal.

The recent cases of *Dale* v. *Winship* (2 Sheil, 394); *Scott* v. *Arnard* (2 Sheil, 256); *The Colonial Government* v. *Steeens* (3 Sheil, 141); and *Kruger* v. *Van Vuuren's Executrix* (5 Juta, 168), show that where a counter claim consists of two counts, one being a liquid claim, the other illiquid: then if the former is within the Magistrate's jurisdiction, and the latter beyond it, the two must be separated, and the Magistrate must try the liquid one but must reject the illiquid.

(The Chief Justice: But here the liquid counter claim is greater than the claim in convention and consequently extinguishes it.)

That would be so if that counter claim were established; but the Magistrate refused to allow us to give evidence as to it.

(The Chief Justice: That does not appear on the record.)

No; but as a matter of fact he did refuse; and it is evident from his reasons that he did not try the liquid claims on their merits but dismissed the whole case as beyond his jurisdiction after having heard defendant only, being misled by the head-note in *Brady* v. *Michiel* (3 Juta, 178).

The Court allowed the appeal.

The Chief Justice said: The Magistrate held that he had no jurisdiction to try the action for £2 18s. because the counter claim for £259 was a *bona-fide* one and was in excess of his jurisdiction. This view would have been quite correct if the whole counter claim were capable of being pleaded in compensation. In that event not only would the plaintiff's claim, if valid, have been extinguished but the defendant would have been justified in objecting to the jurisdiction on the ground that his own liquidated counter claim was in excess of such jurisdiction. But only two items of the defendant's counter claim are of a liquidated nature, and as they together amount only to £9 the defendant could not by pleading them oust the Magistrate's jurisdiction for they are not in excess of such jurisdiction, and being distinct from the other items of the counter claim they could have been claimed by a separate claim in reconvention. The Magistrate therefore erred in holding that the counter claim, of which £9 only was liquidated, debarred him from hearing the plaintiffs case. The defendant's evidence is that the plaintiff owes him £9 for cattle sold. for part of which he holds the plaintiff's cheque. If this evidence be true then undoubtedly the plaintiff's claim is extinguished and judgment ought to have been given for the defendant on the merits. But the plaintiff ought to have had an opportunity of disproving the defendant's evidence. In allowing the appeal, therefore, the Court will remit the case to the Magistrate for the purpose of taking the plaintiff's evidence in disproof of the defendant's plea of compensation. If the plaintiff fails to disprove the defendant's evidence then of course the plea of compensation will be sustained but if the plaintiff succeeds in such disproof he will be entitled to judgment whatever claim for unliquidated damages the defendant may have against him.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinne.]

REGINA v. RENSBURG AND OTHERS. } 1894. March 5th.

This case came on review from a sentence passed upon the prisoners by the Resident Magistrate of Riversdale.

The prisoners, all boys, were charged with the theft of pears, they were found guilty, and sentenced to be punished.

Amongst the prisoners found guilty was one Hendrik Janse.

The Magistrate added a note to the record, to the effect that he had made a mistake in convicting Janse, as the evidence against him was not sufficient, but that he had no power to alter the sentence after it had been passed.

Mr. Justice Buchanan, before whom the case came, remarked that as the evidence against Janse was admitted by the Magistrate to be insufficient his conviction would be quashed, but the sentences passed upon the other prisoners would be confirmed.

FRASER V. FRANK JOHNSON AND CO. | 1894. March 5th and 6th.

Promise by advertisement—Acceptance—Consideration—Condition—Conveyance of goods

The defendant company having published an advertisement to the effect that they would convey goods at certain rates from Port Beira to Salisbury on the arrival of certain steamers, and that for further particulars application must be made to the Company's agents at such port, discovered that the route was so difficult as to be really impracticable and instructed their agents not to forward any goods until further orders.

Held, *that there was no such definite and unconditional promise as to entitle any one of the public to damages against the company upon its refusal to convey goods from Beira to Salisbury.*

The mere acceptance of goods does not amount to a promise to convey them to their destination if no bill of lading or way bill was given, and it was verbally understood that they would be conveyed only part of the way.

This was an action instituted by Alexander Simon Fraser against Frank Johnson & Co. for the sum of £2,406 2s. 2d.

The declaration was in the following terms:

1. The plaintiff is Alexander Simon Fraser, a merchant, residing at Cape Town; the defendants are Frank William Frederick Johnson, Maurice Heany, and Henry John Borrow, lately and at the time of the agreements hereinafter set forth trading under the style or firm of Johnson, Heany & Borrow; the defendant Johnson resides in Cape Town, the defendants Heany and Borrow are at present residing in Mashonaland.

2. In or about February, 1891, and at Cape Town, the plaintiff entered into an agreement with the defendant Johnson, acting for and on behalf of the said firm, whereby the said firm undertook to convey certain merchandise belonging to the plaintiff from Port Beira, upon the East Coast of Africa, to Fort Salisbury, in Mashonaland, within a reasonable time after the arrival of the said merchandise at Port Beira. In consideration of the conveyance of the said merchandise, the plaintiff agreed to pay to the defendants freight, upon the delivery of the said merchandise at Fort Salisbury, at the rate of £18 per ton.

3. In accordance with and relying upon the said agreement the plaintiff in or about May 9, 1891, shipped merchandise to Port Beira, to the value of £2,893 4s. 5d., and in or about September, 1891, he shipped merchandise to the value of £91 11s. 9d.

4. The merchandise shipped as aforesaid duly arrived at Port Beira; the defendants received the same upon arrival into their care and custody, and conveyed it up the Pungwe River to a place called Mapandas, in Mashonaland, but failed to convey any portion of it further upon the road to Fort Salisbury.

5. In consequence of the inability of defendants to supply transport or conveyance of the said merchandise, the plaintiff with their consent took portion thereof, in value about £500, from Mapandas towards Fort Salisbury to a place called Umtali, where he left the same in the care and custody of defendants for conveyance by them to Fort Salisbury; the defendants failed to convey the same to Fort Salisbury, and the plaintiff believes that the said goods are still at Umtali in defendants' possession: the said goods are now of no value to the plaintiff in consequence of defendants' default.

6. Certain of the said goods in paragraph 4 referred to were in and about the months of June and November, 1892, sold to the defendants and to other persons for the sum of £290 18s. 9d.

7. In consequence of the defendants having wholly failed to carry out their contract, the plaintiff after due notice to the defendants caused the said merchandise (with the exception of the portions in paragraphs 5 and 6 referred to) to be conveyed back from Mapandas to Cape Town in order that it might there be sold.

8. The said merchandise sustained serious damage whilst in the care and custody of the defendants at Mapandas, and owing to the said damage and to the costs and charges incurred in the conveyance of the same, it only realised the sum of £341 15s. 3d. after payment of necessary expenses.

9. After the date of the agreement in paragraph 2 referred to, the plaintiff journeyed from Cape Town to Port Beira, in order to proceed thence to Fort Salisbury to sell the merchandise in paragraph 2 referred to: but in consequence of the defendants' breach of the agreement, returned to Cape Town; the plaintiff paid the sum of £54 as passage money to and from Port Beira; the defendants were aware at the date of the agreement that plaintiff intended to proceed to Fort Salisbury for the above purpose, and the plaintiff is entitled to recover the said sum of £54 as special damage from the defendants.

10. By reason of the breach of agrement above

referred to, and of the facts above set forth, the plaintiff has sustained damage in the sum of £2,406 2s. 2d., being £2,747 17s. 5d., less the sum of £341 15s. 3d. realised as aforesaid, as will more fully appear from the annexed account marked "A."

11. Plaintiff is entitled to recover the said sum from the defendants jointly and severally, and has demanded the said sum, but the defendants have refused to pay the same or any portion thereof.

The plaintiff claims:

(*a*) The sum of £2,406 2s. 2d., with interest *a tempore morae*, to be paid by the defendants jointly and severally, the one paying the other to be absolved.

(*b*) Such alternative relief as may seem meet.

(*c*) Costs of suit.

The defendants in their plea said as follows:

1. They admit that the plaintiff is a merchant residing at Cape Town, and they say that he trades at that place in partnership with his father, under the style or firm of Fraser & Son, and he so traded at the dates referred to in the declaration; they admit the other allegations in the first paragraph.

2. As to the second paragraph, they deny each and all of the allegations contained therein.

3. On or about the 10th April, 1891, the said firm of Johnson, Heany & Borrow was dissolved, and all the assets and all the liabilities of the partnership were thereafter taken over by a joint-stock company, duly registered, with limited liability, under the name of Frank Johnson & Co. (Limited), and of which company the defendant Johnson is director.

4. As to the third paragraph, the defendants are aware that in or about the month of May, 1891, the plaintiff shipped certain merchandise to Port Beira, but they are not aware whether he shipped any in September of that year, nor are they aware of the value of the merchandise so shipped, and they specially deny that it was shipped in accordance with any agreement with defendants to transport it, as alleged.

5. As to the fourth paragraph, they admit that they, as representing Frank Johnson & Co. (Limited), landed certain merchandise at Port Beira which belonged to the firm of Fraser & Son, but they say that in so doing they were employed by the Union Steamship Company, as landing agents, and paid by them. The plaintiff arrived at Beira with the said goods, and they agreed with him to convey, and did convey, the said goods to Mapandas free of charge.

6. The plaintiff was unable to obtain transport for the conveyance of the said goods further towards Fort Salisbury, and the defendants, representing the said Frank Johnson & Company (Limited), employed him to take charge of their warehouses and busine-s at Mapandas, and allowed him to store the said goods in their buildings at Mapandas for a certain period free of charge. Save as above, they deny all the allegations in the fifth paragraph of the declaration.

7. Save as to the goods hereinafter in the eleventh paragraph referred to, the defendants deny that they purchased any goods from the plaintiff, as alleged: they are not aware whether any of the said goods were sold to other persons, as stated in the sixth paragraph.

8. As to the seventh paragraph, the defendants deny the existence of any such contract as is therein referred to. With regard to the remaining allegations therein contained, they have no knowledge of, and do not admit the same.

9. As to the eighth paragraph, the defendants say that the goods in question were not in their care and custody at Mapandas, and refer this Honourable Court to the matter set out in the sixth paragraph of this plea. They have no knowledge of the other allegation in the eighth paragraph of the declaration contained.

10. As to the ninth paragraph, they admit that the plaintiff journeyed from Cape Town to Port Beira, and that he returned to Cape Town but they deny all other allegations therein, as well as all the allegations in the tenth and eleventh paragraphs contained.

11. While the plaintiff was at Beira, they, as representing Frank Johnson & Co. (Limited), did purchase a small quantity of goods from the plaintiff, as representing Fraser & Son, and did employ the services of the plaintiff at Mapandas as aforesaid. The firm of Fraser & Son demanded, in the month of April, 1892, payment from Frank Johnson & Co. (Limited) of the sum of £528 4s. 3d. in respect of the matters aforesaid, but on the 2nd June, 1892, Frank Johnson & Co. paid to the said firm of Fraser & Son, of which plaintiff was a partner, the sum of £158 in full settlement of all goods purchased, and of all services rendered by the plaintiff, and of all matters whatsoever between the plaintiff and the defendants or Frank Johnson & Co. (Limited).

12. The firm of Fraser & Son and the plaintiff accepted the said settlement in full satisfaction of any claim, either against the defendants or against Frank Johnson & Co. (Limited), wherefore they pray that the plaintiff's claim may be dismissed with costs,

Issue was joined on these pleadings.

Mr. Searle, Q.C., and Mr. Shippard appeared for the plaintiff, and Mr. Rose-Innes, Q.C., and Mr. Graham for the defendant company.

Alexander S. Fraser, plaintiff, deposed: I

reside at Rosebank. At the end of 1890 I was in Mashonaland with the pioneer force, and returned to Cape Town in December of the same year. I had special leave in order to come down to get goods to start business at Fort Salisbury, principally in saddlery, and boots and shoes. I had been in my father's business here. There was no partnership between my father and me. It was a venture on my own account. Messrs. Mossop & Garland and my father supported me. The former supplied the money. Some time afterwards I saw Major Johnson in town, and explained that I had arranged to send my goods *via* Vryburg. He told me it would be better not to send the goods that way as he was opening up the East Coast route, and it would be much cheaper to ship *via* Beira. He handed me a list of freights which he was arranging for the printers. The tariff was £18 a ton. I saw that some six weeks before the goods were despatched. Before I saw the printed copy he told me that the charge would roughly be £18 a ton. He told me there would be no restrictions as regards quantity. I purchased the goods early in March, and intended to start in April by way of Beira. Major Johnson afterwards told me to hold over till May, when there would be a large shipment from Home. Major Johnson went on to Beira in May. On the 9th May I left Cape Town. I kept a diary. (Produced.) I arrived at Port Beira Monday night, 25th May. The goods were transhipped from the Trojan at Natal on board the Tyrian on 31st May. Major Johnson arrived from Mapandas at Beira with letters. The goods were landed by Captain Ewing. He, Captain Borrow, and Major Johnson had an arrangement with the Union Company about landing the goods. The goods were safely landed; only two packages of woollen goods were damaged. There were in all 127 packages. Major Johnson told me that I was to hurry up to Mapandas, for the wagons were there waiting. We left Beira on the 14th June. The goods were taken up on lighters. I travelled on the tug which towed the lighters. We arrived at Mapandas on the 18th June. Mr. Dymott was in charge. No wagons were there, and no boys. I had two shoemakers with me (Jackson and Rhodes), and they assisted me to land the goods. There was no store, and the goods had to be landed on the river bank. There was nothing to cover them. I remained at Mapandas till 6th August, waiting for wagons. On the 8th August Dymott gave me a note saying I might have two of the wagons which were expected in. There were goods lying at Mapandas for the Chartered Company, for the Bishop of Mashonaland, and others. There were a large number of passengers. There was much discontent, and Major Warton came up from the coast and held a meeting. I then got the promise of wagons from Dymott. Some wagons came in but had to proceed back with provisions for the men who were making the road. Some time in August I left Mapandas for Cape Town to see what could be done. The goods were left on the Pungwe bank. When I got to Cape Town in September I saw Major Johnson, who told me that the goods had been sent on, and I would have to hurry back if I wanted to overtake them. Later, Mr. Rhodes, Major Johnson, and Mr. De Waal went up, and I accompanied them by the same steamer. I took over £90 worth of general goods. Fully £1,361 worth of my goods were saddlery; the balance, about £800, represented general goods.

By the Court: The rainy season on the Pungwe starts in December. There were heavy rains. The goods were uncovered. I had put some grass over them, but that was all.

Examination continued: When we got to Delagoa Bay on the second trip up, Major Johnson told me that the wagons had not turned up at Mapandas. We went on and arrived at Mapandas at the end of September. A store had been built, some of my goods had been put in, some were lying outside soaking wet. Major Johnson, Mr. Rhodes, and Mr. De Waal left, and Major Johnson promised that as no wagons had arrived he would send down 300 boys from Umtali to carry my goods; and I was to pay the boys with some money in the Chartered Company's safe at Mapanda. Dymott was dismissed for the state of things at Mapandas, and I was appointed caretaker at £20 a month. I remained till the end of November. No boys came in and no wagons; so I returned to Cape Town, and arrived here in November. I wrote Major Johnson a letter in January, 1892. I then heard about the amalgamation of Johnson, Heany, and Borrow as a company. I had the fever after coming down here, and in my letter I put in a claim for compensation. Next day I received a reply denying that the company were liable. While at Beira on the second occasion I sold certain goods to Major Johnson and Captain Ewing. I rendered an account for £500 odd on an account form under the name of Fraser & Son. I had purchased all the goods from various people in Cape Town. My father paid for some, and Messrs. Mossop & Garland paid for others. I traded as Fraser & Son. Messrs. Mossop & Garland really financed the whole business. In May, 1892, I wrote to Major Johnson, who was now in Cape Town. My account was £528 4s. 3d. They wrote back saying they only recognised their liability for a Scotch cart, value £50; my services, £50; £48 for the

services of my men; total, £148. As to the Scotch carts, one was sent up to relieve the road-makers, and, on the instruction of Dymott, I gave one cart to the Bishop of Mashonaland and another to a trader. The company disputed liability for these carts. Ultimately they paid me £428, and Mr. Rhodes agreed to pay the balance. Afterwards I saw Major Johnson regarding my goods at Mapandas, and he suggested that the best plan would be to bring them back to Durban and send them up to Pietersburg. I consulted with my father, and I decided to go to Beira and take the goods forward. A man named Stanley was in charge of the company's office there. I arrived at Beira on 19th July, 1892. A man named Bryant accompanied me and I arranged that he should go on to Umtali with the goods. The company (Johnson & Company) paid for the boys. They took goods to the value of £400 odd. The boys were paid at the rate of £1 per head in blankets, &c. Mr. Seymour Fort was the agent for the company at Umtali, and he received the goods. The goods were to be realised at Umtali; if not, they were to be sent on to Salisbury. So far as I am aware those goods are still there. The rest of the goods (chiefly the heavy goods) remained at Mapandas. Some packages were not much damaged, and others were. I returned to Cape Town, having made arrangements that the goods were to be sent down after me. The goods arrived in two lots. The freight was paid through to Cape Town in one instance, and in the other instance to Durban only. The goods arrived in February, 1893, and were sold by auction. I am claiming now the difference between invoiced price of the goods when they went up to Mapandas and the price they realised here. They fetched only £340 at the auction.

Cross-examined by Mr. Innes, Q.C.: Q. You have credited us on the first item, dated 4th June, by cash received, £108 4s. 3d. for goods; how do you account for that?—A. I do not know. I got two cheques on 4th June, one for £158 and one for £39 4s. 3d.; of the £158 only £50 was for goods. As regards the financing of my venture, Messrs. Mossop & Garland advanced most of the money. I put in £120. I shipped the £3,000 worth of goods without any waybill to Salisbury. I relied upon my verbal agreement with Major Johnson in February. I am not aware that Major Johnson was then in the North. If he was in the North then the contract must hav been made after 7th March. The printed cir culars had then been issued. I saw the advertisements in the papers regarding the route. The circulars set forth that if £18 a ton were paid there would be no landing and shipping charges at Beira. I did not pay any landing charges at Beira; £18 a ton was from Beira to Salisbury only. Messrs. Mossop & Garland sold the goods. It may have been in January that I had my first conversation with Major Johnson. He told me that he was sending some goods by way of the East Coast route. I may have said what is good enough for the company is good enough for me. I remember on another occasion he advised me to keep my goods back, as there was some difficulty at Beira. I remember Major Johnson calling us together in the second saloon of the Tyrian. I don't recollect that he said there were one of two things we might do—either to remain at Beira until the route was clear, or go up to Mapandas and see if the wagons had arrived, and if the goods could not be forwarded he would bring them back free of charge. I don't remember that I entered the company's service in October, 1891. I charged the company for services from May to December £320, which Mr. Rhodes paid. I was not then in their service, and I intend to refund that money. It was a mistake charging for that. When I came down in August I told Major Johnson that I would hold him responsible for the goods. Mr. Short, of Mossop & Garland, drew up the account of April, 1892. He also addressed a letter to the company in January, 1892, which I signed. In January I claimed £3,000 in respect of damages to the goods. In April, when I wrote to the company, I made no mention of damages, and subsequently I accepted £158 in full settlement of all claims. Major Johnson was most anxious to help me in every way, as he wanted the country opened up. He offered to pay the carriage back from Mapandas to Durban and Cape Town. He said he held himself morally responsible. He also told me when we first spoke of the matter that I might take my own time in paying the freight.—Q. When you accepted this cheque for £428 in full of all demands, did not your father say to Mr. Berrange that the company had treated you very shabbily, but that the Premier was a gentleman, and you would go and see what he would do.—A. No. My father did not say that, but as a fact, we did see Mr. Rhodes on the subject. As to the goods at Umtali, I had made no arrangements to take the goods farther than Umtali. The boys were paid by the company with limbo and blankets. I paid them as the company's agent. Towards the end of 1892 Mr. Fort wrote down from Umtali, saying that he could not dispose of the goods at my price. Major Johnson advised me to send them on to Salisbury. I had a conversation with Major Johnson at Fontesvilla, and he offered to bear the freight back to Durban.

Re-examined: I paid over the amount of £428 to Mossop & Garland. Major Johnson told me he was going back to Cape Town to arrange for a light steam tramway from Fontesvilla to Umtali.

By the Court: The contract was made before I sent the goods. The verbal agreement was for the transport of goods from Cape Town to Salisbury. The goods I sent overland are now in Johnson & Co.'s store. My intention was to go to Salisbury and set up business, but as the goods could not go forward I could not proceed.

Thomas Aitchison Fraser deposed: I am the father of the plaintiff. I remember my son returning and making arrangements to go back to Mashonaland. Major Johnson said there was to be no particular weight of packages. Subsequently I saw him with my son, and after suding up all the charges he said he would see that the thing was properly carried through. In March I packed the goods, and I think it was in April when Major Johnson and my son talked about freight. Major Johnson said my son could pay the freight when it suited him. Mossop & Garland settled with me in the ordinary course of business at the end of the month. The account was for £1,694. I couldn't say that the whole of that was for my son. I never gave a bill in my life. I agreed to stand security for my son. That was the whole matter. I wrote a letter to Johnson, Heany & Borrow to ask what had become of my son. They replied saying that they had appointed my son to take charge at Mapandas, and that the goods had been forwarded. Major Johnson told me himself that I might keep my mind easy, as my son had as good as left Mapandas.

Cross-examined by Mr. Innes, Q.C.: The conversation *re* the size of packages took place in March or April, 1891. I marked the packages M. & G., because Mossop & Garland are my wholesale agents. I told my son that I would never see him at a loss, but I didn't anticipate it was going to turn out this way. I was not present when the settlement was made with Mr. Berrange. I went and saw Mr. Rhodes soon after he came down-country. I did not consider that the company had treated my son very fairly.

Cecil Bryant deposed: I was a fellow-passenger with Mr. Fraser on his second trip to Mapandas. I entered into an arrangement with Mr. Fraser to take up some goods for him. I had twenty-five boys. The goods were in small packages and in good condition. The other goods were damaged by rats and by water. When I handed the goods over to Mr. Fort at Umtali he gave me a receipt. Umtali was then very dull. There was no money in the place. The people were going down to the new railway. The invoiced price of the goods was between £400 and £500. There was no market for them in Umtali, and they were stored in one of the company's huts. I got back to Mapandas. I made a list of all Mr. Fraser's goods for shipment back to Durban. They were sent on to the company's agent at Fontesvilla.

Cross-examined: I had a letter of introduction to Mr. Fort. He gave me every assistance. I did not tell Mr. Fort whom the goods belonged to.

E. B. Garland, of the firm of Mossop & Garland, deposed: I remember early in 1891 plaintiff coming to me and asking if I would help him with some money towards starting him in business at Salisbury. He had a small sum of his own, and I agreed to supply him with goods and buy for him in town. Those goods were charged to us. We paid Fraser & Son for goods supplied and shipped the goods.

Charles A. Dickson, merchant, Cape Town, deposed that at the request of Mr. Fraser he examined the goods at the Docks (thirty-four packages) on their return from Beira. The goods were more or less damaged and wet, and had received very rough handling.

Maxwell Short, of Messrs. Mossop & Garland, deposed that he had the bills of lading made out for the goods and dealt with the Union Company on behalf of Mr. Fraser. He was instructed to book to Beira, and freight and charges were paid to Beira. The invoiced price of goods, plus Fraser's passage-money, was £1,940. Witness knew nothing of the route being closed.

Mr. Herbert Daniels, of Jones & Co,, auctioneers, deposed that on the 16th March last year he disposed of certain miscellaneous merchandise, and again of a second lot in June. The class of goods were groceries, boots, clothing, brushes, &c. The groceries were badly damaged. The sale was largely attended, and the first lot went for £147 9s.

William A. Watts, clerk for Messrs. Jones & Co., was present at both sales. The goods were in a very damaged condition. The second lot fetched £209 3s. 3d.

Captain Ewing's evidence, taken on commission, was then read to the Court, and this closed the case for the plaintiff.

For the defence,

Major Frank Johnson's evidence, on commission, was read by Mr. Graham. Mr. Johnson said there was no contract whatever.

Mr. Johnson now entered the box and deposed: I first approached the steamship companies on the subject of through tickets to Beira on 17th January, and again after my return from Tuli in March. I had the circulars printed in

March. It was then I saw plaintiff. I told him my brother-in-law from England was going up, and their goods were going up with plaintiff, and he said, "O, that's good enough for me." I had never entered into a verbal agreement with Fraser. A few days after my return from Tuli I gave him a copy of the advertisement. Afterwards, when I heard of the action of the Portuguese Government at Beira, I withdrew the advertisement. That was on the 11th April. The difficulties were over by the 25th April, when I advertised to that effect in the "Cape Times." I left Cape Town on the 30th April, and proceeded up the coast. At Port Elizabeth I gathered from communications that had been received from Beira that the Portuguese were not acting up to their representations in London. I therefore communicated with my company and with the steamship companies. I had printed forms for goods as well as passengers, and they contain the stipulations which would have been enforced had difficulties arisen. These bills of lading were at the steamship companies' offices in Cape Town, and had there been any contract with plaintiff, he would have got one of these slips. The £18 included all landing and shipping charges at Port Beira. When I heard about the troubles with the Portuguese, I informed Mr. Fraser, I was very anxious to have the country developed, and I gave Fraser every possible assistance. I arrived at Beira on 11th May, and saw the Governor-General, who told me there would be no trouble on the river. We proceeded to Mapandas, and the steamer was fired upon. I afterwards got permission to go up in a rowing boat. The road was not begun then from the Beira side. I remember meeting the passengers in the second saloon of the Tyrian. I made a speech to them and explained to them the position. I asked them whether they would prefer their goods landed at Beira or go up with me to Mapandas. Fraser elected to go on, and as there were some grumblers, I told them that if the goods could not be sent through, I would pay the freight back. There were four passengers booked through, three of whom went through to Salisbury, and one returned and had his money refunded. There were no through tickets issued for goods to Salisbury. We made every effort to get through from Mapandas. I was sanguine that the route was possible. We started to make a road and the first day made five miles, the second ten, when we came right into the fly. A subsequent attempt to penetrate the fly country cost us indirectly between £25,000 or £30,000. It is nearly 300 miles from Mapandas to Salisbury. The road, of course, had been made from Umtali. I returned to Cape Town in the Tyrian to see if I could not manage to introduce a light steam tramway. I saw Fraser in Cape Town. He never on any occasion charged me with liability for his goods. I returned with Mr. Rhodes's party. Fraser was on board. He did not tell me till we were between Durban and Delagoa Bay that he had brought a second lot of goods with him. After returning in March, 1892, I frequently saw the Frasers—father and son. They never at any of our interviews charged me with legal liability for the goods. It was only when Mr. Mossop came to see me that that was suggested. Of course I repudiated liability. I never throughout had the least idea that this claim of £3,500 was to be pressed. After the settlement which we made through Mr. Berrange I had no idea that a further claim would be made upon Mr. Rhodes. Mr. Rhodes has no interest in the company. He has an interest in the Consolidated Gold-fields of South Africa. When I arrived in Beira the second time I sent fifty sovereigns to a native agent to provide boys to take Fraser's goods forward. The native agent kept the sovereigns, but did not send the boys.

Cross-examined by Mr. Searle, Q.C.: I came down by the East Coast route in October, 1890, and was very anxious to open it up. After I came down I tried to get someone to take it up, and failing I started it myself as the Pioneer Line. I went up to Tuli to meet Mr. Heany and consult with him on the new route. The full advertisement appeared in the papers on 9th March, 1891, and the circulars were distributed subsequently to that date. In entering into the business I did not do it with the view of making profit as a carrier, but with a view of benefiting the mines in Mashonaland. Advertisements relative to the route appeared in April and July, and on 1st August there appeared a notice in the papers that the service from Mapandas north was withdrawn. On 25th April I advertised that the route was permanently settled, and did not publicly contradict that statement till 1st August. It was known long before that that the route was impossible beyond Mapandas. Had I got Mr. Fraser's goods through to Salisbury I would of course have charged £18 a ton. I did not induce and persuade Mr. Fraser to abandon the overland route; he came to me and said he had had enough of that long land journey, and asked what about the new route by way of Beira. There was no contract between us. My idea of a contract of this kind is that it should be in writing. The original idea was to send the goods in April by the Roslin Castle. On the 11th April the route was closed owing to the Portuguese difficulties; on the 25th it was opened. The Trojan was the

first ship going up, and I left on 30th April. Fraser was willing to throw in his lot with ours. We sent our goods by the same ship. The circular certainly contemplated that there should be through bookings of goods from Cape Town to Salisbury. When the Tyrian reached Beira there were three lighters, which were scarcely sufficient for the cargo, and some of Fraser's goods were landed at Beira. I asked Fraser whether he would prefer to have his goods remain at Beira or have them forwarded to Mapandas. He had them shipped on to Mapandas. There were a number of people going up at this time. I felt more interested in Fraser than any of the rest, because when he had thrown in his lot with ours, I felt morally responsible for him. What I mean by moral responsibility is that Fraser had been an old friend of mine, and he contemplated starting business in a country in which I was very much interested, so I considered it my duty to help him in every way I could. Of course, he would have to pay £18 a ton if the goods got through. As to the Umtali goods, Fraser wished them sold, and I instructed our agent, Mr. Fort, to do his best to sell them. I had offered him a hut on our stand to store the goods. As to the payment of the boys who carried these goods up to Umtali, Fraser paid the boys out of company's goods, which he had no right to do. I heard of that for the first time yesterday. I had offered to lend Fraser £200 to cover this and other expenses, but I did not authorise him to take the company's goods to pay the boys. I am certain that the freight for the goods back from Beira to Durban and Cape Town was charged to my private account. I maintain that the money which was paid by Mr. Berrange to plaintiff was in full settlement of everything.

By the Court: When the settlement was made, plaintiff knew that the goods could not go through. He never suggested that he had any intention of coming down upon us with a second claim.

Mr. Searle: Three days before that settlement was made you knew as a fact from plaintiff's letter to you that he intended to proceed against you for a further claim?—A. I did not.—Q. Do you seriously ask the Court to believe that when plaintiff accepted £158 that it was in full of all claims covering this £2,500, the value of the goods, as well?—A. I understood it in that way and I honestly believed Fraser did.

Re-examined by Mr. Innes: Had there been any contract with Fraser I should have cancelled it immediately I heard of the Portuguese difficulties. We have always kept good books in our office. Had there been any such contract as is now sued upon, it would have been entered in our books. It is not. I never promised to pay the carriage of Fraser's goods from Beira to Pietersburg. The settlement effected through our solicitors was regarded as final.

By the Court: I always gave Fraser to understand that he was sending the goods at his own risk. After 5th May, 1891, Captain Ewing had instructions not to issue bills of lading or through tickets to Salisbury. The Union Company had instructions to the same effect.

Daniel Frederick Berrangé, solicitor to the company, deposed: The settlement of June, 1892, passed through my hands. I dictated the form of the receipt, and both Fraser sen. and Fraser jun. were present in their office when I presented it. Fraser sen. said, "Frank Johnson & Co. have not treated us nicely; they have not dealt with us fairly. But never mind, the Premier's a gentleman, and he's going to make good our loss." I honestly believed then that the settlement was in full of all claims. I did not specify the claims, but I said all claims to date.

This closed the case for the defendant company.

Mr. Searle was heard in support of plaintiff's

Mr. Innes was not called upon.

The Chief Justice after stating the facts said: A promise to the public may, under certain circumstances, entitle any one of the public, who has given the consideration upon which the promise was founded, to a fulfilment of the promise. But the promise must be in such a simple form that the mere acceptance of it would constitute a contract. In the present case the defendant company have by advertisment expressed their intention of conveying goods from Beira to Salisbury at certain rates on the arrival of certain steamers, but the contract would only be entered into when the goods were tendered for conveyance. The advertisement expressly states that further particulars could be ascertained on application to the Company's agents. It could hardly be contended that the effect of the advertisement was to oblige the company to convey the goods from Beira to Salisbury without inserting any conditions into their way-bill or bill of lading. In fact even while the route was deemed practicable the conditions inserted by the company into their bills of lading were such as to throw the risk of the goods ultimately reaching Salisbury at all upon the shipper of the goods. On behalf of the plaintiff it is now contended that the acceptance of the goods at Beira amounts to an unconditional promise to convey them to their destination, but the circumstances under which the goods were accepted completely negative such a promise. The company's agent at Beira refused to give any bill of lading or way-bill, and Major Johnson's evidence, which I fully credit,

is clear that instructions had been given to the agent not to take any goods for conveyance to Salisbury. He offered the plaintiff to take the goods to Mapandas. and to return them to Beira in case the route beyond Mapandas should prove to be impracticable. The route did prove impracticable and the company cannot therefore be held liable for damages for not conveying the goods to Salisbury. The judgment will be absolution from the instance with costs.

Mr. Justice Buchanan: The only point which seems to require any consideration is the circumstance under which the goods were put upon the lighters at Beira and taken up the river. Were they accepted there by the defendant company in pursuance of a previous offer or promise? If they were so accepted then I should find against them, but from the evidence I have come to the conclusion that all that was done at Port Beira on the part of defendants was simply an endeavour to assist plaintiff as much as possible to carry his goods up the river. I think the plaintiff and all the witnesses in this case have given their evidence in a straightforward manner.

Mr. Justice Upington: The view I take is that Major Johnson and Mr. Fraser were on very friendly terms in February, when the agreement was alleged to have been entered into. There was a great deal of communication between them about opening up the country, and a loose and indefinite arrangement was made which does not amount to a contract in law.

[Plaintiff's Attorney, Gus Trollip; Defendants' Attorneys, J.C. Berrangé & Son.]

Ex parte KANNEMEYER. } 1894. March 6th.

Mr. Sheil moved for the admission of Thomas John Kannemeyer as an attorney and notary.

Mr. Kannemeyer took the oaths, and was duly admitted.

THE MASTER OF THE SUPREME COURT V. BERRANGE. } 1894. March 6th.

Notary—Master of Supreme Court—Will—Registration—Grosse.

A notary before whom a notarial will has been executed is bound, upon the death of the testator, to transmit the original in his possession for registration with the Master in terms of sections 3, 6 *and* 7 *of Ordinance No.* 104.

In case of the loss of the original the Master is justified, without further proof, in registering the notarial grosse.

This was an application on notice for an order calling upon the respondent, Mr. Attorney Berrange, under section 6, Ordinance 104, forthwith to deliver to the applicant the original will and testament of the late Ernst Frederick du Toit, who died at Wellington on the 21st February. It appeared from the Master's affidavit, that a death notice was filed in his office on the 24th February, from which it appeared that Du Toit died at Wellington on the 21st February, having left a will.

That a grosse of the will was forwarded to him by the widow of the deceased, from which it appeared that the original will was executed by the deceased before the Notary Public, Daniel Frederick Berrange, the respondent.

That on the 27th February he called upon the respondent, by letter, to lodge the original will with him in accordance with the provisions of section 3 of Ordinance 104, and on the same day he received a reply from the respondent stating that the deed was filed in his protocol, and that he could not part with it without an order from the Supreme Court.

The respondent in his answering affidavit to the above alleged *inter alia* that on the 7th August, 1878, he, as a notary public, executed a notarial will for Du Toit, and that he filed the minute of the said will in his protocol.

That at the time of the execution of the said will the counterpart was duly delivered to Du Toit, and that he (deponent) had not seen it since.

That the said minute was duly bound with other notarial deeds in his protocol.

That the practice amongst notaries for the past fifty years and upwards was to retain the minutes and have the same bound in their protocols, but to deliver the counterparts to the parties executing their wills notarially.

That deponent was a notary public since 1874, and up to the month of February last the several Masters of the Supreme Court had always accepted the counterparts of notarial wills (grosse), the originals remaining bound in the notaries' protocols, and that as far as deponent was aware the present case was the first in which the Master insisted upon the minute being filed in his office instead of the counterpart (grosse).

Defendant lastly said that he did not feel justified in cutting a minute out of his protocol, or part with it, without an order of Court or of a judge. Mr. H. M. Arderne and Mr. C. H. van Zyl, notaries public, corroborated the statements of the respondent as to the practice as to minutes of notarial wills deposed to by him, and also alleged that they would not feel justified in cutting a minute out of their protocols, and parting with it, without an order of Court or of a judge,

and that the practice in the Master's Office had been to receive the counterpart (grosse) instead of the minute.

Mr. Juta, Q.C., A.G., was heard in support of the application, and pointed out that there was a considerable difference between notaries public in this colony and in Holland. In the latter country they were limited in number, and had to receive their appointments from the Government, whereas in this country the number of notaries was practically unlimited, and as many of them were leaving the Colony and going to the S.A. Republic and to other States, and taking their protocols with them, grave inconvenience was being occasioned.

He contended that it was the duty of a Notary to file an original will with the Master, as the grosses were not duplicate originals, they were simply signed by the notary and did not contain either the signature of the testator or of the witnesses.

Sections 6 and 7 of Ordinance 104 must be regarded as well as section 3. See also Act 11 of 1873, section 5.

He cited and discussed the following authorities: *Van der Linden* (Inst. 1. 911), *Van der Keessel* (Th. 330); *Burge* (4, 497); *Voet* (28. 4, 1); *Re Herron* (2 Menz., 445); *Ex parte Neethling* (4 Searle, 59); *Benjamin's Case* (6th May, 1893).

Mr. Rose-Innes, Q.C., for the respondent. The opposition is not fractious but for the purpose of testing a principle.

It is admited that section 6 of Ordinance 104 requires all wills to be given up, and that by section 7 the originals must be filed.

Herron's Case seems to settle the point that original wills must be sent to the Master but the practice has been different for fifty years, and the Master cannot compel a notary to cut a minute out of his protocol without an order of Court. He referred to *Stanford* v. *Brunette* (3 Searle, 101).

The Attorney-General in reply.

The Court granted the application.

The Chief Justice said: It is very much to be regretted that the clear and definite decision of this Court in the year 1840 in the case of *Re Herron* (2 Menz., 445) was ever departed from. In my opinion that case correctly lays down the law as far as it affects the duty of notaries before whom notarial wills have been executed. The words of the 3rd and 6th sections of Ordinance No. 104 are explicit: "Every person who shall at the time of the death of the maker thereof have in his possession any deed being, or purporting to be, or entitled the last will, codicil, or other testamentary disposition of any other person" is bound by the 3rd section to transmit such deed either to the Master, if he resides in certain districts, or to the Resident Magistrate, if he resides in any other district. If he fails to transmit it the Master may summarily apply to the Court or a Judge for an order on such person forthwith to deliver the document to the Master. A notary, in whose protocol the original will of a deceased person is filed, is clearly a person having in his possession such a deed as just mentioned. There is this peculiarity in notarial instruments, that in case of the loss of the original full credence is given without further proof to the notarial copy or grosse which the notary has certified to agree with the original (*Voet*, 22, 4, 3 & 7). Such a grosse, therefore, the Master would be justified in enregistering in terms of the 7th section of the Ordinance if he is satisfied as to the *bona-fide* loss of the original. But if the original is to be found in the Colony the Master may properly insist upon its being transmitted to him for registration. It does not follow that the person who has the grosse in his possession is relieved of his duty under the Ordinance of transmitting it to the Master or Magistrate, as the case may be. The 5th section of Act 11 of 1873 also requires the transmission of a duplicate or otherwise a copy fairly written of the will, and this requirement would be complied with if the original and grosse are both transmitted. If no such grosse is forthcoming the notary would have to send a copy at the expense, I presume, of the estate. Of course if a grosse is sent at the foot of which the te tator has written any underhand codicils, such a codicil, if duly executed, would have full effect as a testamentary disposition, and a copy thereof would have to be transmitted even if the notary had also sent the original will. The objection has been raised that a notary ought not to be required to mutilate his bound protocols by removing original wills therefrom, but this objection might be obviated, as Tennant in his *Notary's Manual* (3rd ed., p. 13) suggests, by executing the original will in duplicate. In any case the Master is right in insisting that the will should be enregistered in the original and his application must therefore be granted.

Their lordships concurred.

[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondent's Attarneys, Messrs. J. C. Berrangé & Son.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

KOCH v. MAIR. { 1894. March 7th & 8th.

Principal and agent—Commission—Irrevocable power of attorney—Assignment—Reasonable time.

An agent appointed to sell his principal's assets for distribution among his principal's creditors is not entitled to charge fees for attendances at sales of land in addition to his commission of two-and-a-half per cent. on the proceeds of such sales, nor can he charge the principal with five per cent for collecting rents in addition to five per cent. paid to his sub-agent.

A power of attorney, purporting to be irrevocable and authorising the agent "forthwith" to sell the principal's assets and pay the proceeds to his creditors, who agree not to sue him until after such distribution, but containing no formal assignment of such assets or release of the principal after distribution of such assets, may be revoked by the principal after the lapse of a reasonable time for such realisation if such revocation does not prejudice the agent.

This was an action instituted by the plaintiff against the defendant, in his capacity as the general manager of the South African Loan, Mortgage, and Mercantile Agency (Limited), for a declaration of his rights under a certain power of attorney, for an account, and for £300 damages.

The declaration was in the following terms:

1. The plaintiff is a builder residing at Woodstock, near Cape Town; the defendant is the General Manager of the South African Loan, Mortgage, and Mercantile Agency Company (Limited) carrying on business in Cape Town; and he is sued in the said capacity.

2. In or about February 1885 the plaintiff entered into an agreement of compromise with his creditors, to whom he was indebted in the sum of £3,826 according to the schedule hereunto annexed marked A.

3. Under the terms and conditions of the said agreement of compromise the said creditors undertook to stay all proceedings against the plaintiff provided he granted an irrevocable power of attorney to one James Hossack, then general manager of the defendant company in his said capacity, and to one Johannes Jacob Daniel Buyskes in his capacity as secretary of the Western Province Administration and Trust Company (Limited), authorising the said persons to sell forthwith for the best prices obtainable the whole of his estate and effects, movable and immovable, either by private sale or by auction, and with the proceeds therefrom to pay the said creditors.

4. The plaintiff on or about February 24, 1885, granted the said power of attorney, a copy of which is hereunto annexed marked "B" in terms of the said power the plaintiff "declared to authorise and empower his said attorneys and agents (to wit the said Hossack and Buyskes) upon receipt of the purchase amounts aforesaid (to wit, of the property in the plaintiff's estate), or any part thereof, to apply the same to the liquidation and payment of those sums of money in which he on this day's date justly and lawfully stands indebted," all the creditors above referred to agreed to and signified their assent to the said agreement of compromise at the foot of the said power of attorney.

5. The said Hossack and Buyskes accepted the duties imposed by the said power of attorney, sold certain of the property in the said power referred to and collected certain rents from houses remaining unsold: the defendant succeeded the said Hossack as secretary of the first-named company.

6. Thereafter in or about the 16th May, 1892, the Western Province Admistration and Trust Company was wound up and liquidated, and the defendant company thereafter accepted and undertook all the duties imposed under the said compromise and power of attorney, upon the two companies therein referred to.

7. In or about the end of 1893 the plaintiff ascertained that the defendant had on hand a certain balance of at least £25 belonging to plaintiff after allowing for the payment of all the debts referred to in the said power of attorney; and there was in addition certain landed property at Woodstock belonging to the plaintiff; it was the duty of the defendant to have paid off the bond upon the said property, to have cancelled the same, to have handed over the said property to the plaintiff and to have cancelled the said power, and the plaintiff requested the defendant so to do.

8. The defendant not regarding his duty as above and in breach thereof refused to deal with the property as above mentioned but advertised the said property for sale and the said property has been sold, to wit, on February 1

1894: and has realised the sum of £675; the plaintiff protested against the said sale.

9. The plaintiff contends that under the true meaning and construction of the said power, the only debts which the said Hoesack and Buyskes were or the defendant was and is entitled to pay under and by virtue of the said power are the debts specified therein and amounting to £3,826.

10. The plaintiff is entitled to demand and has demanded from the defendant an account supported by proper vouchers of all moneys realised by the sale of the said property referred to in the said power, or collected by him as rent from the said property or otherwise, and of all moneys received by him on account of the said plaintiff under the said power, and payment of such balance as may appear to be due to him; the defendant company has failed and neglected to supply such an account although frequently requested so to do.

11. Owing to the mal-administration and neglect of duty of the defendant company in not causing the said properties to be realised in accordance with the terms of the said power the plaintiff has sustained damages in the sum of £300.

The plaintiff claims:

(a) A declaration of his rights under the said power of attorney.

(b) A true and proper account supported by proper vouchers of all moneys received by the defendant company, whether arising from the realisation of the property in the said power referred to, or from rents collected, or moneys received in any other manner.

(c) Payment of such balance as may be shown to be due after debate of the said account.

(d) £300 damages sustained by the defendant's neglect of duty and mal-administration.

(e) Such alternate relief as may seem meet.

(f) Costs of suit.

[A.]

LIST OF CREDITORS.

Mr. Weston:						
By Mortgage Bond dated 25th October '82 ...	£700	0	0			
Interest from 1st January '84 to 24th February '85 at 8 p.c.	64	8	9			
				£764	8	9
Mortgage Bond dated 4th November '82	764	0	0			
Interest from 1st Jan. '84 to 24th Feb. '85 at 8 p.c.	70	6	7			
				834	6	7
				1,598	15	4
South African Mortgage and Mercantile Agency. Ltd.:						
Balance of Mortgage Bond dated 8th August '83	1,470	0	0			
Interest from 1st July '84 to 24th February '85	76	18	11			
				1,546	18	11
The Estate of the late C. L. Wicht:						
Balance of purchase money of ground. Sir Lowry Road	200	0	0			
Interest from 1st February '81 to 24th February '85	48	15	9			
	248	15	9			
but which appears to have been satisfied by payment of				203	12	11
N. M. McIntyre:						
Mortgage Bond dated 2nd August '83... ...	250	0	0			
Interest thereon from 1st July '84	19	12	8			
Mortgage Bond dated 24th August '83 ...	100	0	0			
Interest thereon from 1st July '84	7	17	11			
				377	9	9
R. C. Nelson:						
Balance Mortgage Bond dated 24th August '83	76	12	2			
Less rebate from 24th February '85 to 5th July '85	2	15	8			
				73	16	6
To be refunded by assignees and property cleared				25	6	8
				£3,826	0	1

Making in all the sum of three thousand eight hundred and twenty-six pounds and one penny sterling.

[B.]

IRREVOCABLE POWER OF ATTORNEY.

BE it hereby made known that on this the 24th February 1885, before me C. C. SILBERBAUER, by lawful authority duly sworn and admitted, and in presence of the subscribed witnesses personally came and appeared HENDRIK ALBERTUS KOCH, of Woodstock, who did declare that whereas the state of his financial affairs is such that it has become desirable that such portion of his estate movable and immovable as may be found needful to

pay his creditors should be sold and realised for the benefit of and thereupon distributed amongst his creditors.

Now therefore he the appearer declared by these presents irrevocably and *in rem suam* to nominate, constitute and appoint James Hossack in his capacity as the General Manager of the South African Loan Mortgage and Mercantile Agency Limited or the principal officer for the time being of the said Agency and Johannes Jacob Daniel Buyskes in his capacity as the Secretary of the Western Province Administration and Trust Company or the Secretary for the time being of the said Company, jointly, to be his true and lawful attorneys and agents for him, and in his name, place and stead to appear wherever necessary, and on his behalf and for his account *forthwith to sell and dispose of for the best prices obtainable* the whole of his estate and effects, movable and immovable, wherever situated either by private sale or public auction, also to make and execute the necessary contracts of sale, to subscribe the necessary declarations as to the purchase amounts, and to receive from the purchaser or purchasers the purchase money and to grant good and valid receipts and discharges therefor.

Also on his behalf to appear before the Registrar of Deeds of this colony and then and there give and pass transfer and conveyance of the immovable property in due and customary form, and to accept mortgage in settlement of purchase money and to consent to the cancellation thereof. Also in the event of the failure of any such purchaser or purchasers to make payment of the purchase amount aforesaid, then on his behalf to institute and take all such lawful steps as may be necessary for the recovery of the same by legal process in the Supreme or other competent Courts in this colony, or if necessary to defend any actions which may be brought in respect of the same. The appearer further declared to authorise and empower his said attorney and agents upon receipt of the purchase amounts aforesaid or any part thereof to apply the same to the liquidation and payment of these sums of money in which he on this day's date justly and lawfully stands indebted to the several creditors of his estate, and generally in and concerning the premises to do, perform and execute all and whatsoever shall be requisite and necessary, as fully amply and effectually to all intents and purposes as he the appearer might or could do if personally present and acting herein, hereby giving and granting to his said attorneys jointly full power of substitution and authority in and about the premises, hereby promising and agreeing to ratify and confirm and allow all and whatsoever his said attorneys or their lawful substitute or substitutes shall lawfully do or cause to be done in and about the premises by virtue of these presents. And lastly, the appearer declared to revoke and make void all former powers of attorney, authorities and deputations by him at any time heretofore made, given or executed in any of the matters or things abovementioned to any person or persons whatsoever.

Thus done and executed at Cape Town, the day, month and year aforesaid.

H. A. KOCH,
Quod Attestor,
C. CHRISTIAN SILBERBAUER,
Notary Public.

Reserving rights against third parties and excussion of securities of a personal character.

JAMES HOSSACK.

With reference to the foregoing power of attorney, we, the undersigned creditors of the said H. A. Koch, do hereby agree to stay all proceedings against him until the assets of his estate needful for the payment of our debts have been realised and the amounts of such realisation applied to the settlement of our claims.

Dated at Cape Town, 24th February, 1885.

J. J. D. BUYSKES, Secy. W. P. A. & T. Co.
q.q. Mrs. WESTON (born BRAND).
J. HOSSACK.
J. C. DE KOCK, *q.q.* Exors. C. L. WICHT.
N. M. MCINTYRE.
R. C. NELSON.
Quod Attestor.
C. C. SILBERBAUER,
Notary Public.

Defendant's Plea and Claim in Reconvention.

I. For a plea to the plaintiff's declaration the defendant says as follows:—

1. He admits the allegations in paragraph 1 of the declaration.

2. As to paragraphs 2, 3 and 4 of the declaration he denies that an agreement of compromise was entered into by the plaintiff with his creditors as therein is alleged, and says that on the 24th February, 1885 the irrevocable power of attorney forming annexure B to the declaration was executed by the plaintiff with the consent of the creditors referred to in annexure A, who accepted the assignment or arrangement on the terms and conditions set forth at foot of the said power of attorney.

3. He further says that the capital sums and amounts of interest already due on the 24th February, 1885, are correctly stated in annexure "A," but he denies in other respects the correctness of the account forming that annexure, and

says: pecially that the creditors of the plaintiff were entitled to interest on their respective claims after the said 24th February, 1885, until the said claims were paid or discharged.

4. He does not admit the construction placed by plaintiff upon the terms of annexure "B" to the declaration to which he begs to refer this Honourable Court.

5. He admits the allegations in paragraph 5 of the declaration, but as to that paragraph and paragraph 6 he says further that from the time of the execution of the aforesaid power of attorney until April, 1893, the Western Province Administration and Trust Company acted with the knowledge and approval of the plaintiff in and about the administration of his affairs under the said power, and the said company has not been finally wound up or dissolved, but that after the said company had resolved to liquidate its affairs he, the defendant, in April, 1893, accepted and undertook the duties of administering attorney or assignee which had previously been discharged by the said company.

6. As to paragraph 7 he admits that at the end of 1893 there was certain landed property of the plaintiff at Woodstock under his, the defendant's administration, but he denies the other allegations in the said paragraph.

7. He admits that he advertised for sale and sold the said landed property for £675, which sum has not yet been paid, and that the plaintiff protested against the said sale, but he denies the other allegations in paragraph 8 of the declaration and says that he sold the said property under the said power of attorney and with a view to reducing the existing indebtedness of the plaintiff in respect of the claims of creditors who were parties to the assignment or arrangement of the 24th February, 1885.

8. He denies the correctness of the amount stated in paragraph 9, and again says that the creditors referred to were, and are entitled to receive interest on the amount of their respective unpaid claims after the 24th February, 1885.

9. He says that the plaintiff before April, 1893, from the Western Province Administration and Trust Company or since that date from himself received proper accounts and he annexes hereto, marked "C," an account showing the amount of the plaintiff's present indebtedness in respect of the aforesaid claims of creditors.

10. He says specially that the realisation of certain of the assets received under the aforesaid power of attorney has been delayed at the plaintiff's request.

11. Save as aforesaid he denies the allegations in paragraphs 10 and 11 of the declaration.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

II. And for a claim in reconvention the defendant (now plaintiff) says as follows:

1. He craves leave to refer to the several paragraphs of the above plea.

2. On the 24th February, 1885, the plaintiff (now defendant) was the holder of a certain mortgage bond under which one Carslaw was indebted to him in the sum of £230, and it became and was the duty of the plaintiff (now defendant) to deliver for the benefit of his creditors the said bond to the persons in whose favour he executed the aforesaid power of attorney.

3. The plaintiff (now defendant), not regarding his duty in that behalf, kept the said bond, and thereafter in the month of February, 1894, obtained judgment against the said Carslaw in an appeal to this Honourable Court on a promissory note granted in satisfaction of the said bond, whereupon the defendant (now plaintiff) applied for, and obtained from this Honourable Court an order interdicting the said Carslaw from paying over any money under the said judgment to the plaintiff (now defendant) pending this action, and costs of the application were directed to abide the result.

4. For greater security the defendant (now plaintiff) begs to refer this Honourable Court to the terms of the judgment and order referred to in the last preceding paragraph.

Wherefore the defendant (now plaintiff) prays for an order confirming the said interdict, and declaring him to be entitled as against the said Carslaw and the plaintiff (now defendant), to the benefits of the said judgment, or that he may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs, including the costs of the aforesaid application.

ANNEXURE "C."

The Estate of Mr. H. A. Koch in account with the Western Province Administration and Trust Company (Limited), and the South African Loan, Mortgage and Mercantile Agency (Limited), his attorneys, under power dated 24th February, 1885.

DR.

PAYMENTS.

Expenses connected with the sale and up-keep of Properties mortgaged to the South African Loan, Mortgage and Mercantile Agency, (Limited), including Commission to Attorneys, Bonuses at Sale, &c.	£355 9 2

Similar expenses connected with the Property mortgaged to Mrs. Weston under Bond dated 25th October, 1882...	178 12 9		
Do. do. do. under Bond dated 4th November, 1882 ...	147 12 3		
Do. do. Estate C. L. Wicht	48 1 1		
		£729 15 3	
Balance carried to Distribution Account ...		3,236 9 6	
		£3,966 4 9	

Cape Town, 31st January, 1894.

CR.

RECEIPTS.

Purchase price of Properties mortgaged to the South African Loan, Mortgage and Mercantile Agency (Limited)	£1,820 10 0		
Interest on do.	55 1 3		
		£1,875 11 3	
Purchase price of Property mortgaged to Mrs. Weston under Bond dated 25th October, 1882...	1,216 10 0		
Interest on do.	16 19 8		
		1,233 9 8	
Purchase price of Property on which C. L. Wicht's Estate had preferent claim ...	245 0 0		
Interest on do.	6 14 0		
		251 14 0	
Purchase price of Property mortgaged to Mrs. Weston under Bond dated 4th November 1882...		20 0 0	
Rents received from Properties mortgaged to the South African Loan, Mortgage and Mercantile Agency		127 8 0	
Rents received from Property mortgaged to Mrs. Weston under Bond dated 4th November 1882...		440 17 10	
Rents received from Property mortgaged to Mrs. Weston under Bond dated 25th October 1882...		17 4 0	
		£3,966 4 9	

NOTE.—Full details of the items stated in the above account were rendered to Mr. Koch from time to time.

DISTRIBUTION ACCOUNT.

Creditors and Nature of Claims.	Amount of Claims.	
I. Mrs. A. WESTON.		
Amount of Mortgage Bond dated 25th October 1882	£700 0 0	
Interest from 1st January 1884 to 30th June 1885 at 8 per cent.... ...	84 0 0	
		£784 0 0
II. Mrs. A. WESTON.		
Amount of Mortgage Bond dated 4th November 1882	764 0 0	
Interest 1st January 1884 to 30th June 1893 at 8 per cent.	576 4 0	
Insurance Premiums	10 1 0	
		1,350 5 0
III. SOUTH AFRICAN LOAN, MORTGAGE AND MERCANTILE AGENCY		
Balance of Mortgage Bond for £1,550 dated 8th August 1883...	1,470 0 0	
Interest 1st July 1884 to 24th February 1885 at 8 per cent.	76 18 11	
		1,546 18 11
IV. N. M. MCINTYRE.		
Second Bond, dated 2nd August 1883 on property mortgaged under Claim No. I.	250 0 0	
Interest 1st July 1884 to 12th September 1885 at 12 per cent.	33 4 0	
		283 4 0
V. N. M. MCINTYRE.		
Second Bond, dated 24th August 1883 on property mortgaged under Claim No. III.	100 0 0	
Interest 12th July 1884 to 7th August 1885 at 12 per cent.	13 4 6	
		113 4 6
VI. R. C. NELSON.		
Balance Third Bond for £113 dated 24th		

August 1883 on property mortgaged under Claims III. and V.	76	12	2				
Interest 6th July 1885 to 6th August 1885 at 10 per cent.	0	12	8				
				77	4	10	
VII. THE ESTATE OF C. L. WICHT.							
Balance Purchase Amount of Ground off Sir Lowry Road	200	0	0				
Interest 1st February 1881 to 30th June 1886 at 6 per cent.	60	9	3				
				260	9	3	
				£4,415	6	6	

Cape Town, 31st January, 1894.

ESTATE OF MR. H. A. KOCH.

Particulars of Distribution.	Amounts Distributed.			Deficiency.		
I. Principal and Interest	£784	0	0			
II. Account of Principal... £20 0 0						
O/a Interest, *being* revenue derived from property ... 248 8 6						
	£268	8	6	£1,081	16	6
III. O a Principal 1,412 16 6						
O a Interest 50 13 7						
	1,463	10	1			
*Amount paid by Mr. Koch direct to the Creditor, o a deficiency... 83 8 10						
	£1,546	18	11			
IV. Principal and Interest	283	4	0			
V. Principal and Interest	113	4	6			
VI. Principal and Interest	77	4	10			
VII. O / a Principal and Interest	208	12	11	56	16	4
	£3,193	4	10	£1,138	12	10
Balance of funds undistributed ...	43	4	8			
Amount brought forward to this Account... ...	£3,236	9	6			
Towards satisfying this deficiency there remain the following assets:						
Cash in hands of Attorneys ...	43	4	8			
Purchase price of Property mortgaged to Mrs. Weston, sold but not paid for ...	675	0	0	718	4	8
Leaving unsatisfied				£420	8	2

The replication was general, and issue was joined on these pleadings.

Mr. Searle, Q.C., and Mr. McLachlan appeared for plaintiff.

Mr. Schreiner, Q.C., and Mr. Graham for the defendant.

Hendrik Albertus Koch, builder, Woodstock, plaintiff, deposed: In 1893 I held a second bond amounting to £230 on certain property belonging to one Carslaw, situate at Woodstock. The bond was passed before I signed the power of attorney. The Mortgage Company held a first bond for £900. They called up the bond in 1883, and the property had to be sold. They offered it to me. I paid £900 for the property. I passed a bond for £900 in their favour. In 1885 I found that I was unable to pay the interest on bonds over property owned by me. Carslaw owed me £230. I sued him for the amount last January. I owed Mr. Scholtz, an attorney, £30. He insisted on payment and his account was settled. The power of attorney was signed, and afterwards some of my properties were sold. The property over which Mrs. Weston held a bond for £700

*Besides this amount Mr. Koch also paid direct to the S. A. Loan, Mortgage & Mercantile Agency (Ltd.), a sum of £377 15s. 7d. in respect of interest on their claim from 24th February, 1885, to 26th June, 1893, the date of payment,

fetched £1,000. The other property over which Mrs. Weston held a bond for £600 odd was offered for sale by auction, and over £700 was bid for it. There was more realised from these two properties than would cover the amount of my bond and interest. They would not allow me to take the whole thing in my own hands. Mr. Hossack and Mr. Buyskes and Mr. Nelson and other creditors pressed me to sign the power. Subsequently I passed a bond on some of my property to pay off defendants. I paid them £450 in 1892, and I concluded that settled everything. Since then I have been receiving the rents of the house in Woodstock. In 1887 I owed defendants between £200 and £300, and the value of the property bonded to the Mortgage Company was then £1,000. The last valuation was £750. The property is worth more. I got the valuation reduced because I had to pay the rates.

The Chief Justice: If a man goes to a Divisional Council or a Municipal Council to have the valuation of a property reduced he is bound to adhere to that valuation; he cannot afterwards say it is worth more.

Witness (continuing) said he recovered judgment against Carslaw. The property that was put up for auction is now worth £800.

Cross-examined by Mr. Schreiner, Q.C.: I considered that the assets which I handed over in 1885 were fully sufficient to meet the demands of my creditors. I could pay 20s. in the £. I was to get clear of all interest after 25th February, 1885. The property over which Mrs. Weston had a bond was put up for sale three times. £700 was offered, but it was ultimately sold for £675. Buiskes was the secretary of the Western Province Administration Company, but I did not tell him that my property (Mrs. Weston's) was worth £1,000. Mr. Buiskes never spoke to me about the sale. Mr. Carey, who collected the rents, wanted me to transfer my property one day to a woman. Of course I was not such a fool. Mr. Silberbauer drew the power of attorney. (Copies of accounts and correspondence with Mr. Van Noorden put in.)

Re-examined: I gave all my papers to Mr. Silberbauer. I maintain that the agreement was made that the creditors should not charge any interest after the date of the power. The arrangement was that they had to sell my property, pay all my debts, and hand any balance which might remain over to me. I have spent a good deal of money in repairing property.

By the Court; At the time I gave the power of attorney I had actually taken transfer of the property. Scholtz had Carslaw's bond.

John R. Lancaster, accountant, deposed that he had gone over the accounts rendered by the defendant company and by the Western Province Administration Company to the plaintiff. Witness framed an account (annexed to declaration A) on the basis of defendant's account, allowing interest up to the date of the signing of the power, and taking all the amounts defendants received, as well as analysing the manner in which the money had been expended. The accounts were all on the basis of defendant's figures.

Cross-examined by Mr. Schreiner: The total amount of money which passed through defendant's company's hands was £4,687 18s. 10d. I have seen how that money has been divided, and how it stands in relation to the various objects. I have made no suggestion as to bonuses.

Emile van Noorden deposed that in June, 1893, on behalf of the plaintiff, he raised a loan of £440 over the property at Woodstock. The Mortgage Company's bond was cancelled, and a fresh bond was taken. Witness collected the rents; there were three people paying £1 15s. each, and one paying £4. Mr. Koch paid £50 for repairs of this property. Witness previously offered £500 for the property, which was sold for £675.

Cross-examined: I never charge more than 6 per cent. on bonds of £200 and upwards; for smaller amounts I may charge more.

Charles Rixon, landed proprietor, Cape Town, remembered the sale of Koch's property in 1885. He bid £700, but they would not take his bid. Witness considered that at £700 it would be a good investment.

Cross-examined: Could not say why the property was not knocked down to him.

Mattys Adam Kafferdien, residing at Woodstock, next to plaintiff's property, deposed that she offered £800 for the property five months ago. Witness was present at the recent sale, but did not bid because her husband was at Malmesbury. Mr. Koch wanted £1,000 for the property.

This closed the plaintiff's case.

For the defence,

Alexander Mair, secretary of the defendant company, deposed: I have been manager since 1886, a few months after Mr. Hossack's death. The administration was in the hands of the Western Province and Trust Company; it remained in their hands until April, 1893. We then took it over. From that time until this correspondence had taken place with Mr. Van Noorden, I never heard any question of accounts not being rendered to Mr. Koch. I obtained a settlement of my claim against Koch. He owed us £461. I told Koch that if he would make up £450 we would give him a full discharge. Of that we received £377 from Mr. Van Noorden, which was

a loan raised from Mr. Arderne. I never saw the power of attorney until the question was raised by Mr. Du Preez in a letter to me last year. The sale of the property mortgaged to Mrs. Weston took place through my instructions chiefly at the instigation of the South African Association. I had no conversation with Koch about the realisation of the property We carried ont his wishes to save his property.

Cross-examined by Mr. Searle, Q.C.: We were the administering assignee in April, 1893.

Johannes J. D. Buyskes deposed that before and after February 1885, he was secretary of the Western Province Trust Company, and ceased to be secretary in 1886. He remembered the power in question, and became one of the assignees The account was kept between Koch and the Western Province Administration Trust Company. Witness controlled the administration of the estate. Koch came to see him often when properties were realised to urge him to pay over the money to bondholders to stop the interest. Witness's company held Mrs. Weston's power also. Mr. Du Preez was our attorney. There never was any compromise made to release plaintiff from his liabilities. At the time the power was entered into property was pretty well up. Plaintiff never in his presence asked Mr. Hossack to sell; he persuaded him not to sell. Mr. Ball was his clerk up to 1886. Witness advertised the property for sale. Mr. Koch advised him to do so.

Cross-examined: Mr. Koch took a good deal of interest in the sale. The rents were good at the time, and it was altogether a paying concern.

Alexander Aitken, accountant in the defendant company's offices, deposed that he had gone into the accounts, and had prepared the account annexed to the plea, which represents the figures of the various accounts rendered. Mr. Lancaster said there is a disparity of £5 odd, but witness was convinced that his (Aitken's) figures were correct.

Robert E. Ball, until February, 1885, till March, 1889, a clerk in the employ of the Western Province Trust Company, deposed that he kept all the books, including Koch's account. Mr. Koch came to the office, and witness gave him every information he wanted. He never complained about the properties not being realised. The accounts show that most of the rents were collected with only one commission. Witness collected the rents. Subsequently Carey collected the rents, and the company allowed him 5 per cent. Plaintiff was always very keen that the property should not be sold at a sacrifice.

Cross-examined: I cannot tell you on what sales the bonuses appearing in the accounts were charged unless I saw the conditions.

Johannes Frieslich, who succeeded Mr. Merrington at the Trust Company's offices, deposed that he administered there from October, 1889, till 1891. During the whole of that time he only saw Mr. Koch once. Koch had nothing to complain about the administration of the property. Witness never knew that Koch had a bond against Carslaw.

Andries B. Hofmeyr, who was the last secretary of the Western Province Trust Company, deposed that Koch once came to him to know the amount of his indebtedness. Plaintiff saw the accounts in 1888.

Cross-examined: The Trust Company practically ceased to transact business in 1893, when they resolved on liquidation.

Ferdinand Karie, law agent, Cape Town, deposed that he along with his partner collected accounts for the Trust Company in 1891. The commission was 5 per cent. Koch declined to have the property which was bonded to the agency put up for sale in 1891.

John Carl Smit, one of the directors of the Western Province Trust Company, said when the power was passed witness attended the sale of Mrs. Weston's property. Koch was present. He made no objection as to sale. Koch never made any objections or complaints as to his property not being realised.

Harry Gibson, secretary of the South African Association, deposed that he acted as agent for Mrs. Weston early in 1892. About that time the general manager of the Loan and Mortgage Company wrote saying that Mr. Koch's agents were now collecting rents. As there seemed to have been no payments made for the previous year, witness asked that steps should be taken to realise this property, which was sold for £675. Witness considered that a fair price; £500 was as much as he would have been prepared to offer to protect the mortgagee. Between 1889-92 the Western Province Trust Company had Mrs. Weston's power, but witness could not say what was done with the rents of the properties; they were not in the account rendered.

Mr. Smith (recalled) deposed that with regard to the charges for attendance at sales, the custom was to charge one guinea for the presence of the director, and to charge 2½ per cent. in addition.

Mr. G. W. Steytler said his company charged only 2½ per cent., which covered everything, and which was only charged when a sale took place. They made no charge for the presence of directors.

Mr. Searle, Q.C., for the plaintiff: The

decision of the case depends upon the construction of the power of attorney.

It is clear that the administration of the estate was bad.

The Chief Justice: Did the plaintiff not acquiesce?

There is no evidence of acquiescence—nor is there a plea of waiver.

It is clear what the intention of the parties was at the time the power was executed.

The landed property was to be realised.

All interest ceased from the date of the assignment.

The Chief Justice. Is that so? Even in insolvency the interest would not cease to run.

If interest did not stop it is difficult to see what advantage the plaintiff gained by the assignment.

It was the duty of the assignees to have realised in time, and if any loss has been sustained through their negligence they are liable in damages.

The Chief Justice: Can an assignor, who has acquiesced in the conduct of his assignees afterwards claim damages against them for not carrying out the terms of the deed of assignment?

Yes. In the present case Koch was not in a position to object as the power was irrevocable.

The Chief Justice: The realisation of two of the properties was delayed at Koch's request.

Waiver must be clearly proved and it has not been in this case.

Mr. Schreiner, Q.C., referred to paragraphs 2 and 4 of the declaration, and contended that the plaintiff's case was that no interest was payable after the assignment (paragraph 9 of declaration). By that contention the plaintiff must stand or fall.

The word "forthwith" in the power of attorney was an empowering word but it cast no duty on the assignees who acted with the full knowledge of Koch. The maxim *Volenti non fit injuria* applied.

As to the claim in reconvention, although the assignees were not trustees in the English sense of that term, still there was sufficient privity between them and Mrs. Weston to render them liable to her.

Tradesmen's Benefit Society v. *Du Preez* (5 Juta, 269). He also cited *Osmond's Trustees* v. *Hofmeyr* (4 Juta, 43).

Mr. Searle, Q.C., in reply referred to *Watson* v. *Burchell's Executors* (1 Sheil, 269, and 9 Juta. 2)

The Chief Justice said: The document out of which the present dispute has arisen is dated the 24th February, 1885, and it is headed "Irrevocable Power of Attorney." It recites that the state of the plaintiff's financial affairs is such that it has become desirable that such portion of his estate, movable and immovable as may be found needful to pay his creditors should be sold and realised for the benefit of and thereupon distributed among his creditors. It then proceeds to declare that the plaintiff thereby irrevocably and *in rem suam* appoints the two persons named therein to be his lawful attorneys and agents "forthwith to sell and dispose of for the best prices obtainable the whole of his estate, and to apply the proceeds to the payment of those sums of moneys in which he on this day's date justly and lawfully stands indebted to the several creditors of his estate." I may at once state that, in my opinion, the use of the words just quoted was intended to exclude debts incurred after the date of the power, and not interest lawfully accruing on bonds after such date. By a postscript to the power the plaintiff's creditors, including the two agents, "agree to stay all proceedings against him until the assets of his estate needful for the payment of our debts have been realised and the amounts of such realisation applied to the settlement of our claims." The power contains no formal assignment of the plaintiff's property or of his rights of action against others, nor do the agents, in their capacity as such, formally undertake to perform any duties towards the plaintiff or his creditors. I take it, however, that so long as the power was in force the plaintiff was bound to hand over to the agents all assets belonging to him at the date of the execution of the power, and the agents were bound to distribute all assets so handed over in the manner indicated by the document. It is common cause that the creditors only undertook to stay proceedings pending the realisation and distribution of the assets and that they did not release the plaintiff from any debts that might be still owing in case the assets did not suffice to pay all the debts. Under this power the agents sold certain land belonging to the plaintiff and applied the proceeds to the payment of the bonds on the land, including a bond in favour of one of the agents, viz., the defendant as secretary of the South African Loan Agency. One piece of land which was mortgaged to the other agent, as the representative of one Mrs Weston, was not sold until this year, that is, nine years after the date of the power. In the interval the agent collected the rents on this land in a somewhat perfunctory way, but the receipts from rent were not sufficient to pay the interest. Sometimes they employed sub-agents to collect the rents, and the plaintiff was charged with 5 per cent. commission paid to the sub-agents in addition to the 5 per cent. charged by the agents them-

selves. It appears that upon the sales by auction of the plaintiff's land a charge was made against him of one guinea for each attendance by the agent in addition to the 2½ per cent. commission charged upon the proceeds of such sales. The accounts from time to time presented to the plaintiff and accepted by him showed that the property mortgaged to Mrs. Weston had not been sold. When it was ultimately sold it realised about £25 less than could have been obtained for it in 1885. It appears that in 1885 a debt was owing to the plaintiff by one Carslaw which at that time was not considered of much value. As far back as July, 1893, the plaintiff intimated to the agents that he no longer considered the power binding, and in the beginning of the present year he gave formal notice of revocation. He also sued Carslaw for the amount of his debt and recovered judgment for £280; this sum Carslaw has been interdicted from paying to the plaintiff pending an action to try whether the power is still in force to the extent of authorising the agents to receive the amount for the purpose of paying the deficiency upon Mrs. Weston's bond. Under the plaintiff's declaration three questions arise, viz., first, whether the plaintiff is entitled to have it declared that according to the true construction of the power the creditors were entitled to interest accruing after its date, and this question, as I have remarked, must be answered in the affirmative. The second question is whether, on a debate of the accounts rendered by the agents, any overcharge has been proved. In my opinion, the double commission on receipt of rent and the charge for attendance at the sales ought not to have been made, and to the extent of £24 9s., the balance for distribution must be increased. The third claim is for damages for not selling the land in due time. Upon this point the evidence as to damage is very meagre, and as the agents were led to believe that the plaintiff did not object to the delay there will be no order on this claim. The defendant by his claim in reconvention prays for an order confirming the interdict already mentioned and declaring him entitled to the benefit of the judgment obtained by the plaintiff against Carslaw. The decision in regard to this claim must depend upon the question whether in February, 1894, nine years after the execution of the power, the plaintiff was justified in revoking it. There can be no doubt that by our law a principal may effectually bind himself by contract not to revoke his power. Such a contract would be implied where the power is given to secure the performance of a promise made by the agent for valuable consideration, whether the power on the face of it purports to be irrevocable or not. On the other hand, as *Voet* (17, 1, 17) justly observes, a mere undertaking on the part of the principal not to revoke the power does not make it irrevocable. In order to make the power irrevocable there must be consideration for the undertaking, or if there was no such consideration it must be shown that the agent has done such acts under the power that its revocation would be to his prejudice. In the present case the plaintiff would have no power of revoking the power so as to prevent the agents from paying over any assets in their hands to the creditors, because, having once received those assets, they are under a legal obligation to distribute them among the creditors. But the question is whether the plaintiff may not revoke the power so far as to prevent the agents from collecting any more assets. The document does not include an assignment of the plaintiff's assets except so far as such assignment may be inferred from the power. The agents are only authorised "forthwith to sell and dispose of" the plaintiff's effects. Now supposing the authority had been "within twelve months to sell and dispose of" the effects, there can be no doubt that at the end of that time the plaintiff could revoke the power so as to prevent the agents from getting more assets into their hands. The use of the word "forthwith" shows that the principal intended the power to be expeditiously exercised. The agents were aware of the debt owing by Carslaw, and if under the power they could recover the debt from him (which is by no means clear) they had nearly nine years within which to do it. After that lapse of time the plaintiff surely could revoke the power to recover this sum from Carslaw. The creditor Weston, whom the defendant is anxious to pay, has of course her rights intact against the plaintiff, but, after such a lapse of time, she cannot insist upon being paid through the instrumentality of the agents. The effect of our decision is that, under the circumstances, the plaintiff had the right to withdraw any power the agents might have had to recover Carslaw's debt, inasmuch as the time contemplated by the power had lapsed and the withdrawal could not in any way prejudice the agents. Judgment will therefore be given for the plaintiff for the rectification of the account with costs, and absolution from the instance on the claim in reconvention with costs.

Mr. Justice Buchanan: All through this case I have had grave doubts as to whether this was an irrevocable power. I certainly agree with the Chief Justice that the power could be revoked within a reasonable time.

Mr. Justice Upington: I doubt if I have ever

known a case in which the Court has gone so far out of its way to assist the plaintiff in his pleadings as in this case. The declaration differs so much from the evidence given and the case finally set up, that it strikes me the plaintiff did not understand his position originally.

[Plaintiff's Attorneys, Messrs. Du Preez & Walker; Defendants' Attorneys, Messrs. Fairbridge & Arderne.]

GENERAL MOTIONS.

BATCHELDER V. BATCHELDER. } 1894. Mar. 8th.

Mr. Castens moved on behalf of Catherine Batchelder for a rule *nisi* requiring her husband to show cause why petitioner shall not be admitted to sue him *in forma pauperis* in an action for judicial separation, by reason of his alleged misconduct and cruelty.

The rule was made returnable on 12th March.

Ex parte SAGAR.

Mr. Jones moved for the attachment *ad fundandam jurisdictionem* of this Court of certain two pieces of ground in the village of Robertson, in an action about to be instituted by edictal citation against Antonie Petrus Rosenkrans for the recovery of the amount of a mortgage bond.

The Court made the order, the rule to be returnable on 12th April; one publication in the "Express" (Bloemfontein) and one in the "Government Gazette."

BROAD V. SCHULTZ AND SMITH.

This was an application by the defendants for the issue of a commission to take the evidence in London of such witnesses as may be produced on their behalf.

Mr. Searle, Q.C., for applicants; Mr. Sheil for respondent.

The application was granted.

BREYTENBACH V. SMIT'S EXECUTORS.

This was an application for an order restraining the respondent from transferring to the heirs of the said estate the farm Matjesgoed Vley, in the division of Oudtshoorn, pending an action in the next Circuit Court to declare the will of the said Smit null and void.

Mr. Molteno for applicant; Mr. Searle, Q.C., for respondent.

The application was refused with costs, applicant to have an opportunity of recovering the costs in any action he might be advised to bring.

CLASSEN V. LERM AND ANOTHER.

Mr. Molteno applied for the removal of this case to the next circuit at Oudtshoorn.

Granted.

Ex parte LYONS AND SMITH. } 1894. March 8th.

Hotel business—Purchase on behalf of minor.

Where it was clearly for the benefit of a minor, the Court authorised the purchase for the minor of a hotel business, which had been previously carried on by his father.

Petition of Mary Ann Lyons and Richard Shaw Smith, the former in her capacity as the widow and executrix testamentary of the estate of the late John Lyons, and the latter in his capacity as tutor dative of the minor children of the late John Lyons (by his first wife), namely, Daniel Edward Lyons, Vincent Anthony Lyons, Kathleen Lyons and Eileen Lyons, and of the minor Daniel Edward Lyons, duly assisted by his tutor dative. Under the will of the late John Lyons the first-named petitioner and the two first-named minors are entitled each to one-sixth, and each of the last two mentioned minors to one-fourth of the estate. There are no special provisions in the will as to realising or dealing with the estate.

Amongst the assets in the estate is a hotel in Frederick-street, Port Elizabeth, which had been successfully carried on by the deceased, valued at £1,000, and certain furniture, fittings, and other movable property valued at £158 10s.

The petitioners alleged that it was their desire that the minor Daniel Edward Lyons, who is the eldest son of the deceased and 18 years of age, should take over from his father's estate the hotel and movable property at the valuations above referred to.

The tutor dative alleged that he was confident that it would be to the advantage of the minor that he should purchase the hotel business, and that pending the minor's coming of age satisfactory arrangements could be made for letting the property and preserving in good hands the goodwill of the business as a going concern.

The first-named petitioner also alleged that as one of the heirs, and executrix testamentary, she was satisfied that the desired sale would be advantageous to the estate and in the interests of the family generally.

The prayer was that the Court might authorise the first-named petitioner to sell and the second named petitioner to purchase for the minor the hotel premises and furniture for £1,158 10s.

The matter was referred to the Master and

be recommended that the application should be granted, mainly on the grounds that the tutor dative, a man of considerable business experience, had so strongly alleged that it would be for the benefit of the minor.

Mr. Castens was heard in support of the application.

The Court, under the special circumstances, granted the order as prayed.

[Applicants' Attorneys, Messrs. Scanlen & Syfret.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONIAL CASES.

VAN DER BYL AND CO. V. FULLER. } 1894. Mar. 12st.

Mr. Molteno applied for the final adjudication of defendant's estate.

Granted.

ROSS AND CO. V. LOUBSER.

Mr. Molteno moved for provisional sentence for £30 8s. upon a promissory note, and £10 upon a dishonoured cheque.

Granted.

MORRIS V. WESSELS.

Mr. Tredgold moved for provisional sentence on a cheque for £216 1s. 3d., with interest from 29th November last.

Granted.

CAUVIN V. CARDINAL.

Mr. Tredgold moved for provisional sentence on a mortgage bond for £500. Counsel also asked that the property specially hypothecated be declared executable.

Granted.

DE BRUYNS' EXECUTORS V. WAHL.

Mr. Molteno moved for provisional sentence for £120 14s. 2d., with interest at the rate of 7 per cent. from 17th June, 1893, being the balance of mortgage bond. Counsel also asked that the property specially hypothecated be declared executable.

Granted.

PURVIS V. WATSON

Mr. Tredgold moved for judgment under rule 329 for £25 10s., being cash advanced by plaintiff.

Granted.

ARGUS COMPANY V. CHAMBERS.

Mr. Buchanan moved for judgment under rule 329 for £11 16s., for goods sold and delivered.

Granted.

S.A. ORPHAN HOUSE V. BEEDLE.

Mr. Buchanan moved for judgment under rule 329 for £45, for rent due.

Granted.

HALL V. HILL.

Mr. Watermeyer moved for judgment in default of appearance for £104 15s. 9d.

Granted.

Ex parte MYBURGH.

Ex parte GUTHRIE.

On the motion of Mr. Buchanan, Mr. Francis R. Myburgh and Mr. Francis A. C. Guthrie were admitted as attorneys and notaries.

REHABILITATIONS.

Leave was granted to apply to the Court again in six months in the case of C. W. Borcherds, and in the case of William Anderson leave was granted to apply again in three months, the books kept by the insolvents not being sufficient in the opinion of their trustees to disclose all their business transactions.

GENERAL MOTIONS.

Re WILLIAM MCLEOD'S INSOLVENT ESTATE.

Mr. Watermeyer moved for an order authorising the calling of a special meeting of creditors in the said estate for the purpose of electing a new trustee in the place of George H. Lewis, the original trustee, who died in 1891 in the South African Republic.

Granted.

IN THE MATTER OF THE MINORS RIEDEMANN.

Mr. Molteno applied for authority to the father and natural guardian to act on their behalf in respect of the sub-division of part of the farm Troe Troe, in the district of Van Rhyn's Dorp, of which they own a share, all the other proprietors being agreed in the

matter, and it being for the benefit of the minors that the partition should be carried out.

The Court gave the necessary authority, and appointed the father *curator ad litem* for the purpose of effecting the sub-division.

PETITION OF GRACE ELLEN BERKELEY.

Mr. Watermeyer applied for leave to petitioner to institute an action without the assistance of her husband, who is absent from the Colony and engaged in business in London, in respect of a false and malicious defamation of her character by one Dora Green.

Granted.

PRICE V. PRICE.

Mr. Currey asked the Court to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her congugal rights, and for an order for a division of the property held in community.

The Court made the rule absolute.

WENTZEL AND SCHLESWIG V. SMUTS.

Mr. Buchanan applied for the attachment *ad fundandam jurisdictionem* of this Court of all moneys of the respondent in the hands of Baker McLeroth, and of the balance of a debt due to the respondent by Dr. Fick in an action about to be instituted by edictal citation for the recovery of the amount of a promissory note.

The Court granted the attachment, and gave leave to sue by edictal citation, personal service, the citation to be returnable by the first day of next term.

BATCHELDER V. BATCHELDER.

Mr. Currey asked the Court to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against her husband for a judicial separation *a mensa et thoro*.

The Court made the rule absolute, Mr. Currey to act as counsel.

PETITION OF JOHANNES F. BEZUIDENHOUT.

Mr. Tredgold applied for transfer to petitioner of certain one-fifth share of two lots of the farm Kamnatie, in the division of Oudtshoorn, devolving upon him as the purchaser of all right to inheritance accruing to Maria Vosloo out of the estates of Dyssel and others, the power to transfer executed by the seller's husband being informal, and he having departed from the Colony leaving no address.

The Court ordered counsel to ascertain where the power of attorney was, and then application might be made to a judge in chambers.

Ex parte KINGSMILL AND ANDERSON *re* CROCKART'S WILL. } 1894. Mar. 12th.

Administrators—Trusts—Release.

Where persons had been appointed executors testamentary and administrators of certain trusts constituted by the will, and they had finally liquidated the estate as such executors but were still administering the trusts. the Court at their request relieved them from their trust, and substituted a Trust Company in their place on the Company finding security to the satisfaction of the Master of the Supreme Court.

This was the petition of William Thomas Kingsman and William Anderson in their capacity as executors testamentary of the estate of the late James Crockart.

The petitioners were the executors testamentary of the will of the late James Crockart of Humansdorp dated 18th March 1887. Letters of Administration were granted to them on 29th February 1888,

The petitioners alleged that they had realized the whole of the estate and effects of the deceased, and had filed their final liquidation account on 26th October 1893.

That in terms of the will they had paid all the direct legacies, and that the rest residue and remainder of the estate was left to them on certain trusts.

That they were desirous of being relieved of their offices of executors and trustees: Kingsmill on the ground that he was about to leave the Colony and proceed to Europe for an indefinite period, and Anderson on the ground of ill-health, and incapacity to administer the trusts of the will during Kingsmill's absence.

That should they be relieved of their trusts, they had ascertained that the Port Elizabeth Assurance and Trust Company were willing to accept the office of executor dative to administer the trusts and that they would give security before entering thereon.

The petitioners prayed that they might be relieved from their position as executors and trustees under the will of the late James Crockart upon satisfactorily accounting for the trust funds of the estate in their hands.

The will appointed the petitioners executors, administrators of the estate, and guardians of the minor heirs, and also granted them the

power of assumption, substitution and surrogation.

Mr. Tredgold was heard in support of the application.

The Court substituted the Port Elizabeth Assurance and Trust Company for the petitioners. The company to give security to the satisfaction of the Master. The order not to have the effect of relasing the petitioners from liability for past acts of administration.

[Petitioners' Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

ZACKON V. VAN RHYN AND ARP'S TRUSTEE. | 1894. March 13th.

Mr. Innes, Q.C., and Mr. Graham for plaintiff; Mr. Schreiner, Q.C., and Mr. Searle, Q.C., for defendants.

The Court gave judgment in terms of the consent paper filed.

KLOPPER V. VAN STRAATEN. | 1894. March 13th and 20th.

Non-negotiable note—Indorsement—Aval—Surety—Consideration—Benefit of division—Benefit of excussion—Renunciation of benefits—Principal debtor—Costs of excussion.

A person endorsing a promissory note which has not been endorsed by the payee prima facie *incurs the liability of an* "aval" *or surety for the maker to the lawful holder.*

A surety who has not renounced the benefit of division is entitled to a division of the debt pro rata *between himself and others who may after him have become sureties for the same debtor in respect of the same debt.*

It is a sufficient consideration for a contract to become an additional surety, that the creditor, after accepting such additional surety, is liable to be met with the exception of division in a suit for the debt against the first surety.

The costs of an unsuccessful suit brought by the creditor against the principal debtor cannot be recovered from a surety who has renounced the benefit of excussion, nor can they be recovered from a surety who has not renounced such benefit unless such action had been previously notified to him

The case of Hurley v. Marais (2 Juta 155) *followed.*

This was an appeal from a judgment of the Resident Magistrate for Kokstad in an action in which the present appellant was sued by the respondent for the sum of £127 7s. 9d., being partly due on a promissory note, and partly in respect of certain costs incurred in excussing the maker of the note.

The summons alleged:

1. That on or about 30th May, 1893, the plaintiff agreed to sell to one David Frederick Smit certain sheep for the sum of £250 upon the condition that the said Smit should obtain two sureties for the due and punctual payment of the said purchase price.

2. That in pursuance of such condition the said Smit obtained as sureties the defendant and one Van Niekerk.

3. That thereupon the plaintiff sold the sheep to Smit, and agreed to accept his promissory note for the sum of £250, payable on the 30th August, 1893, as security for the said purchase price, subject to the condition that the defendant and Van Niekerk should guarantee to the plaintiff, by their endorsement of the promissory note, the due payment of the same by Smit.

4. That accordingly the promissory note (hereunto annexed) for £250 was on 30th May, 1893, made by Smit in favour of the plaintiff, and thereupon endorsed by the defendant and Van Niekerk, whereby he, the said defendant, agreed and engaged to bind himself jointly with Van Niekerk as surety for the said sum of £250, and by so doing rendered himself liable to pay half the said sum of £250 in the event of the said Smit failing to pay the same.

5. That upon the note falling due the same was not paid, and judgment was obtained against Smit, and upon his failing to satisfy the same a writ was sued out and the property of Smit attached, which upon sale realised the sum of £9 8s. 9d.

6. That the expenses of the legal proceedings in the excussion of Smit amounted to £11 16s. 6d., which, after deducting the amount realised by the attachment (and sale), left a balance due upon the said expenses of £2 7s. 9d. (as per account annexed), for which the defendant was liable.

The plaintiff claimed:

(*a*) The sum of £125, with interest thereon from 30th August, 1893, being the amount for which the defendant was liable as a joint guarantor and surety as aforesaid.

(*b*) The sum of £2 7s. 9d., balance of costs incurred in and about the excussion of the said Smit as aforesaid.

(*c*) Costs of suit.

The defendant denied liability and pleaded the general issue.

The evidence showed that Klopper's signature did not originally appear on the note but was only added on the suggestion of the bank manager who refused to discount the note without Klopper's endorsement.

The further facts are fully stated in his lordship's judgment.

The Magistrate gave judgment for the plaintiff for the amount claimed with costs, the following being his reasons:

The promissory note is in due form. The plaintiff, the payee, is the lawful holder. The note was dishonoured at the bank. The plaintiff excussed the drawer Smit. The note bears two endorsements. The second endorser, Klopper, is sued for the balance unpaid after excussion of Smit, with interest and £2 7s. 9d. balance of costs. Plaintiff avers that the endorsers are in the position of ordinary guarantors or sureties for the payment of the bill at maturity.

The defendant says his endorsement was merely for a special purpose, viz., to enable the plaintiff to discount the bill at the bank, and inasmuch as the plaintiff did not discount it, the endorsement carries no responsibility.

Between these two the Court takes the note as it finds it, and considers that as the averment of the defendant is silent in the instrument, and the signatures are genuine, that the oral evidence of the defendant cannot alter the contract. This further in light of the fact that the proceeds for which the note was given were used to retire the former bill (H), which bore the names of Smit, Van Niekerk, and Klopper, as drawer and endorsers in a matter of accommodation, showing that they had benefited by the transaction with the plaintiff.

Regarding the costs, defendant received notice of the dishonour of the note, and he could have intervened and paid it, not having done so he is liable for the balance of costs. Judgment for plaintiff, as prayed, accordingly.

From this judgment the defendant now appealed.

Mr. Rose-Innes, Q.C., in support of the appeal: The Magistrate's reasons are certainly remarkable. After hearing a number of witnesses on both sides as to the circumstances under which the note was signed and the position of the defendant thereunder, he dismisses the evidence and says the plaintiff is the legal holder of the note and that the defendant's evidence could not vary it. He does not say that he rejected the defendant's evidence.

A note may be on the face of it perfectly in order and yet the person sued on it, whether maker or endorser, may prove that he made or endorsed the note for the accommodation of the holder and so defeat the holder's claim.

The question to be decided is whether the circumstances under which the defendant endorsed the note are such as to entitle the plaintiff to recover.

The case does not come under Act 19 of 1893, which was not promulgated until 12th September 1893. (See sections 96, 54 and 88.) The old law therefore applies by which a person placing his name on a bill, unless a holder, became liable as a surety.

The evidence shows that Klopper endorsed not as surety but for the accommodation of Van Straten.

As to the costs of excussing Smit the Magistrate was clearly wrong in giving judgment for that sum. *Hurley* v. *Marais* (2 Juta, 155).

Mr. Searle Q.C., for the respondent: The Magistrate was correct. Klopper endorsed not to accommodate Van Straten but for the benefit of Smit. There was a conflict of evidence and the Magistrate was right in looking at the document. As to the judgment for costs of excussion, *Hurley* v. *Marais* does not apply as sufficient notice was given, see *Hjul Bros.* v. *Lyons* (1 H.C.R., 164).

Mr. Rose-Innes Q.C., in reply: We admit that Klopper is *prima facie* liable as surety, but the presumption has been rebutted by the evidence.

As to the costs of excussion, *Hurley* v. *Marais* is directly in point. We had no notice.

Cur. ad vult.

Postea (20th March).

The Court delivered judgment.

The Chief Justice, said: This is an appeal by the defendant against a judgment of the Resident Magistrate of Kokstad awarding to the plaintiff the sum of £125, being one-half of a guarantee alleged to have been given by the defendant for the debt of one Smit, and the further sum of £2 7s. 9d. for costs incurred by the plaintiff in suing Smit. The facts are briefly these: In May, 1893, the plaintiff sold some sheep to Smit on condition that for so much of the price as Smit could not pay in cash he should give a bill with one Van Niekerk as surety. The sheep were delivered to Smit, who afterwards paid to the plaintiff some

money in cash, and for the balance of the price viz., £250, gave him a promissory note made by Smit in favour of the plaintiff, and endorsed by Van Niekerk. The plaintiff took the note in, satisfaction, but on attempting to discount the note at the bank he was informed that the bank required the additional name of Klopper, the defendant. Thereupon the plaintiff returned to Smit and asked for Klopper's name as additional security. Klopper endorsed the note below Van Niekerk's name. There is a conflict of testimony as to what took place at the time when this endorsement was made. According to the defendant, he endorsed the note for the accommodation of the plaintiff, to enable him to discount the note, but according to the plaintiff, it was done with the view of having another surety for Smit. We may take it that the Magistrate accepted the plaintiff's version. It is certain that the sheep were sold by Smit before the defendant endorsed the note, and that the proceeds were applied to the payment of another note to which Smit, Van Niekerk, and the defendant were parties. The note for £250 was not paid by Smit on maturity, and notice of dishonour was given to the defendant, who forthwith repudiated all liability in the matter. The plaintiff then sued Smit, but recovered nothing except a few pounds, which went in part payment of the plaintiff's costs. The balance of costs unpaid is £2 7s. 9d., which the plaintiff seeks to recover in this action, as well as one-half of the amount of the promissory note. The note was made prior to the passing of Act 19 of 1893, but it would have made no difference in the decision of this case if the note had been made afterwards. That Act does not, in my opinion, alter the rule that a person who endorses a non-negotiable note' *prima facie* incurs the liability of an "Aval,' or surety for the maker to the holder. The note in question, being made in favour of the plaintiff or order, was not negotiable until endorsed by him. But before the plaintiff endorsed it, Van Niekerk at first and the defendant afterwards wrote their names on the back. The presumption is that they did so as sureties to the plaintiff for Smit, the maker. This presumption, so far from being rebutted, is fully supported by the oral evidence. But it is now contended that there was no consideration for the defendant's undertaking of suretyship, inasmuch as neither he nor the principal debtor (Smit) received any benefit in return, and as plaintiff did nothing which entailed on him labour, forbearance, or detriment. The defendant's argument is that the benefit which he had received from the sale of the sheep was a past consideration, which could not give validity to a promise made to become surety for Smit at a time when Smit could not be compelled to give another surety. In my opinion there was sufficient consideration for the defendant's promise. Until Klopper signed, Van Niekerk was liable for the whole amount of the note, after excussion of the principal debtor. The benefit of division had not been renounced, and therefore the effect of Klopper signing as additional surety, although some time after Van Niekerk signed, was to confer on Van Niekerk the benefit of division with Klopper. (See *Voet* 46, 1, 22.) This was a sufficient forbearance on the part of the plaintiff to found a consideration for the defendant's promise to pay the note on failure of the maker. The defence of want of consideration therefore fails, and the Magistrate's judgment for £125, being one-half of the note, must be upheld. In regard to the question whether the plaintiff is entitled to recover the costs of his unsuccessful suit against Smit I regret that I cannot agree with the Magistrate's decision. It is true that the defendant has not renounced the benefit of excussion, but it is equally true, that he has not availed himself of the benefit. If he had admitted the contract and availed himself of the benefit, the law would have implied a request that Smit should be first excussed, and a promise to pay the costs if Smit was unable to meet them. The defendant denied his liability altogether, but it does not follow that, if he had known that an action was to be brought against Smit for the costs of which he was incurring a liability, he would have persisted in refusing to satisfy the plaintiff's claim. At all events it has been definitely laid down by this Court in *Hurley* v. *Marais* (2 Juta, 155), that a surety who has not renounced the benefit of excussion is not liable for the costs of an unsuccessful suit instituted by the creditor against the principal debtor, of which no notice had been given to the surety. The costs in the present case are not heavy, but the principle involved is important. After a surety has been informed that the principal debtor is about to be excussed, it is a legitimate inference from his silence or from his refusal to pay that he wishes the excussion to proceed, but without such a notification a request to that effect could not be legally implied. The appeal must therefore be allowed in respect of the plaintiff's claim for his costs in the previous suit against Smit. If the defendant had confined his appeal to this issue, the plaintiff would probably have tendered to forego the amount rather than contest the

appeal. The amount is very small compared with the amount in respect of which the Magistrate's judgment has been upheld, and therefore in reducing the Magistrate's judgment by £2 7s. 9d., the Court will order the defendant to pay the costs of appeal.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. COOPER AND ANOTHER. { 1894. Mar. 14th.

On the motion of Mr. Giddy, the venue was changed from the Supreme Court to the next Circuit Court to be held at George.

REGINA V. WRIGHT. { 1894. Mar. 14th.

Scab Act—Knowledge of infection—Owner of sheep.

Although the existence of scab among sheep raises a presumption that the owner knew of it, such presumption may be rebutted by clear proof to the contrary.

An owner of sheep cannot be convicted of a contravention of the 7th section of Act 28 of 1886 if it is proved that neither he nor his manager, employed to look after his sheep, was aware of the existence of scab among the sheep.

This was an appeal from a judgment of the Eastern Districts Court (before Mr. Justice Jones and Mr. Justice Maasdorp) sustaining the conviction of the appellant by the Resident Magistrate of Albany.

The summons alleged that George Greatbatch Wright (the appellant) did on or about the 23rd day of November, 1893, and at Krantz Drift, in the district of Albany, in which the Scab Acts are in operation, contravene section 7, Act 28 of 1886, by wrongfully and unlawfully neglecting to give notice to the inspector of area No. 8 of certain scab-infected sheep of which he was the owner, and also neglect to take reasonable precautions and means to prevent the spread of the disease called scab.

The accused, after taking certain objections which are not material for the purposes of the report, pleaded not guilty, and conducted his own defence.

It appeared from the evidence that the accused, who lives in Graham's Town, has a farm called Krantz Drift in the district, on which he keeps sheep. The farm is under the management of one Petzer. On the 24th November last the scab inspector of the district visited Krantz Drift, inspected the sheep and found them, as he alleged, badly infected with scab. He went to Petzer and told him that he was surprised at having received no report of the outbreak, as he had repeatedly warned him to give notice as soon as there was an outbreak. He also expressed the opinion that the sheep must have been suffering from the disease for at least ten days. The accused had been on the farm for a few days (during which time it had been raining almost constantly) prior to the 23rd November, on which date he left, but he knew nothing about the scab, nor did the sheep afford any indication of being diseased during the time that he was on the farm, nor did Petzer, the manager, report the matter. The first intimation the accused received of the sheep being infected was on the 27th November, when the inspector wrote to him reporting the matter.

Petzer's evidence went to show that it was only on the morning of the 24th November that he discovered that two of the sheep were scabby. There was also evidence to show that the farm was well supplied with dip, and that the sheep were constantly dipped.

The Magistrate found the accused guilty and inflicted a fine of 10s. The following was the Magistrate's finding: That the sheep in question were infected for at least ten days before the inspection. That section 7 requires the owner to report infection. That the owner did not report. That the owner did not know of the disease until the 27th November, but that his servant did. That there were native servants on the farm, who could have been sent with a notice to the inspector.

The accused appealed from this decision to the Eastern Districts Court, which upheld the Magistrate's sentence, and from the latter judgment the present appeal was brought.

Mr. Schreiner, Q.C., in support of the appeal: The point in the case is simply one of knowledge. There is an omission in the section (7) in not making the owner or occupier liable. But to hold the owner liable he must have had knowledge. *Mens rea* is essential to liability and this section being a penal one must be construed strictly. He referred to *Maxwell on the Statutes* (pp. 77 and 80); *Graham, N.O.* v.

Pocock & Co. (Buch., 1868, p. 233); *Colonial Government* v. *Palm* (4 H.C., 365); *Regina* v. *Sleep* (30 L.J.N.S.M.C., 170); *Nichols* v. *Hall* (8 L.R.C.P., 322).

The knowledge of the agent in this case cannot be held to be the knowledge of the principal. *Dickenson* v. *Fletcher and Others* (9 L.R.C.P., 1).

Mr. Justice Upington cited *Regina* v. *Murtha* (3 H.C.R., 165).

That conviction was under the Liquor Act. When a person takes out a liquor licence he knows he is carrying on a risky trade, and if there has been a contravention of the Licensing Acts on his premises he cannot excuse himself by alleging that the offence was committed by a servant—(Act 28 of 1883, section 77; Act 44 of 1885, section 11)—but the case of a farmer is quite different.

Again, when did the default take place and when was the offence committed? The Crown must show that we had knowledge of the disease on the 23rd November.

Mr. Giddy for the Crown: Petzer must have known on the 23rd November that the sheep had been infected for some time.

There is evidence that he frequently dipped the sheep, which would have been unnecessary if they were clean.

This was a finding of fact by the Magistrate and should not be interfered with.

Mr. Schreiner, Q.C. in reply cited *Regina* v. *Pocock* (3 Sheil, 369).

The Court allowed the appeal.

The Chief Justice said: Under the 7th section of Act 28 of 1886 it is the duty of the owner of sheep which are or may become infected within any proclaimed area to give notice of such infection to the inspector of the district. I quite agree with the appellant's counsel that the owner cannot be subjected to the penalties resulting from a contravention of the section unless he had knowledge of such infection. The means of knowledge alone is not sufficient, although of course the existence of such means of knowledge would go far, in the absence of clear proof to the contrary, to show that the owner knew of the infection. If it would be patent to an ordinary observer that the sheep were infected it would be difficult to convince any court or jury that the owner or his manager in charge was norant of the fact. In the present case the inspector stated that he found the sheep badly infected on the 24th November, but he gave no further particulars. From the rest of the evidence I am satisfied that it required a pretty close inspection to ascertain the existence of scab. The appellant, the owner, was on the farm for some days before the 23rd of November, and during that time, he says, the sheep afforded no indication of being diseased. The learned judge who presided in the Court below appears to have held that the appellant ought to have known of the existence of scab in his sheep, but the Magistrate found as a fact that the appellant did not know of it until the 27th of November. The only ground, therefore, on which he could have been convicted of contravening the Act on the 23rd of November was that his manager knew of the infection on that day. The Magistrate found as a fact that the manager did know of it. Now, assuming that the knowledge of the manager would be sufficient to fix the appellant with criminal liability, what evidence is there against the manager except the presumption of knowledge arising from the actual existence of scab. That presumption, I admit, exists, but in my opinion it was fully rebutted by the evidence. The manager swears that he only became aware of the existence of scab among the sheep on the 24th November, and then only two were infected. The inspector does not state that more than that number were infected. Now if the Magistrate believed the appellant's statement, as he appears to have done, that there was no indication before he left on the 23rd November of the sheep being infected, it is difficult to understand why the manager must be held to have discovered the disease. If he had discovered it before the 23rd no reason has been suggested why he should have withheld the information from his employer. Loth though I am to disturb the findings of magistrates upon questions of fact I cannot uphold a verdict which appears to me to be clearly in conflict with all the facts of the case. The appeal must be allowed.

Mr. Justice Buchanan: The appeal is allowed on the question of fact. Looking at the evidence given in this case, I see very little to show that the condition of the sheep on 23rd November was such that anyone could have known that they were infected with scab. The rain having fallen for four or five days may be the reason they were not inspected more closely.

Mr. Justice Upington: I am not satisfied that there is sufficient proof to show knowledge that the sheep were infected with scab, although very little more would have been sufficient in my opinion to have shown such knowledge.

[Appellant's Attorneys, Messrs. Scanlen & Syfret.]

Ex parte BURGER. } 1894.
Re BURGER'S WILL. } March 20th.

Spes successionis—Sale—Sanction by Court. B. *and his wife by their mutual will bequeathed to one of their sons,* F., *a farm, but directed*

that if F *died childless the farm should, after his and his wife's death, pass to his three brothers, or in case they predeceased him, to their lawful descendants and heirs.*

F *became insolvent and his interest in the farm was sold to one* N.

At *the age of* 61 F. *was childless, although he had been married twice, his second wife being* 45 *years of age at the date of the petition.*

N *having offered* £825 *for the contingent interest of* F.'s *three brothers and their children in the farm the Court on the petition of* F.'s *brothers sanctioned the sale of their interest to* N. *for* £825 *and directed the purchase price to be paid into the Guardian's Fund there to remain during the lifetime of* F. *and his wife.*

Petition of Willem Petrus Burger and Schalk Willem Burger on his own behalf and on behalf of his brother Barend Frederik Burger.

The petitioners, together with Frans Jacobus Lubbe Burger, are the sons of Willem Petrus Burger and Anna Aletta Elizabeth Burger (born Lubbe), his wife married in community of property, and now both deceased.

The petitioners' father and mother by their last mutual will and testament bequeathed to their son, the above-mentioned Frans Jacobus Lubbe Burger, their perpetual quitrent place called Karree Rivier, situated in the division of Calvinia, for the sum of £375 in manner following:

Now proceeding thereto we the Testators declare to bequeath beforehand as a legacy as we do hereby bequeath and that after the death of the survivor of us both.

* * * * * *

Secondly.

To our son Frans Jacobus Lubbe Burger our perpetual quit-rent farm Karree Rivier situated in the Hantam District Calvinia for the sum of Fifteen Thousand Cape Guilders.

* * * * * *

With reference to the hereinbefore mentioned second bequest we the Testators hereby intimate that it is our express will and desire that if it happen that our son Frans Jacobus Lubbe Burger dies childless that his to him bequeathed farm called Karree Rivier will then, after his and his wife's death, have to come and belong to his three brothers hereinbefore mentioned or by predecease of them to their lawful descendants and heirs.

The above-mentioned Frans J. L. Burger is now 61 years of age and childless. He married twice, his present wife's age is 45, and he is and has been for some time insolvent.

Recently all his right, title, and interest in the place Karree Rivier were sold in his insolvent estate, subject to the will and testament of his parents above referred to, for the sum of £577 to one Johannes Abraham Nel, who further agreed to pay the petitioners the sum of £825 so as to divest the property of the conditions imposed by the will.

There are thirteen major and five minor children of the petitioners living.

The petitioners alleged that owing to the uncertain and encumbered tenure of the property it was fast going to ruin, and that they and their major children were all agreed that the sum of £825 represented a fair market value for their reversionary interest in the property, and that they had agreed to sell it to Nel for that amount.

(Deeds of sale and of renunciation of rights by the petitioners and their heirs were attached to the petition.)

The petitioners further alleged that they were advised that there were possible minors' interests concerned which prevented Nel from obtaining valid unincumbered transfer, and that an order of Court would be necessary for the purpose.

The prayer was that the Court might make such order and grant such relief as might seem fit.

Two valuations of the property were given, one of £1,000 by a farmer living in the District and another of £1,200 by Frans J. L. Burger, who filed an affidavit in support of the proposed sale.

The matter was referred to the Master, and he reported as follows:

"This is an application to the Court to set aside a clear and direct provision of a will, a course for which I do not think sufficient cause has been shown.

It is impossible to say now who will ultimately become entitled to the ownership of the farm in question, but the petitioners' present interest in it is contingent on Frans Burger dying childless, an event which cannot as yet be regarded as certain, and on their surviving him.

"It must also be borne in mind that on the death of Frans Burger the property will be relieved from the burthen of the life interest now possessed by Nel, and that its value will thus be considerably increased, and it would therefore have been more reasonable for the petitioners to buy him out than to propose to sell the legatees' rights to him.

"I have not gone into the question of the present market value of the farm, but I may point out, that while the petitioners ask leave to dispose of it for £825, the value placed upon it in the two supporting affidavits is £1,200 and £1,000 respectively.

"I cannot recommend the application, but should the Court be pleased to accede to it, I beg to suggest that the purchase amount should be subject to my approval and that it be paid into the Guardian's Fund, there to remain until the death of Frans Burger."

Mr. Schreiner, Q.C., in support of the petition: As to the Master's objection, It is not asking anything improper to sell a right for £825, which may be defeated by Frans Burger leaving issue. The price is not for the property, but for the rights which the applicants have contingent on the failure of issue to Frans Burger.

That issue could never take against Nel, who has bought from the trustee, but Nel is willing to pay the price agreed upon to confirm and complete his title.

It is submitted that the proposal is fair and reasonable, and that the parties may be trusted to know their own interests.

We are willing to adopt the Master's suggestion that the purchase money should be paid into the Guardian's Fund.

The Court granted the application.

The Chief Justice said: If this were an application to set aside the will, then the Court could not possibly entertain it, but it is not an application to set aside the provisions of the will. The will, no doubt, provides that the three sons, or in case of their death their children, should have the benefit of the bequest in case Burger and his wife should die childless. But this is a right which the three legatees may transfer for any valuable consideration, and the only question is, whether the valuable consideration here is such that in the interests of the minors the Court would sanction it. If the consideration is more than sufficient, then it is for their interest. It seems to me that it is a very doubtful right which is being transferred, for although it is by no means probable that Burger and his wife will ever have any children, still I think that £825 is a very fair sum to pay, considering that £575 has already been paid for the property. The Court will therefore make an order sanctioning the sale for the sum of £825, and will adopt the further suggestion of the Master, that the purchase price should be paid into the Guardians' Fund. there to remain during the lifetime of F. J. L. Burger and his wife.

Their lordships concurred.

[Applicants' Attorneys, Messrs. Reitz and Herold.]

Ex parte BELL. { 1894. Mar. 20th.

Mr. Shippard moved for the appointment of a curator to take charge of and administer the property of Mary Bell, residing in Queen's Town, who in consequence of mental infirmity and extreme old age is unable to attend to her affairs.

The Court granted a rule calling upon Mary Bell to show cause, on or before April 12, why she should not be declared incapable of administering her property, and why her son, Archibald Crichton Bell, should not be appointed curator, the rule to be made absolute, with costs out of her estate in case no cause to the contrary shall be shown, on or before 12th April.

PETITION OF HARRY EDWARD REED.

Mr. Shippard applied for authority to the Registrar of Deeds to register certain general bond for £200, executed by petitioner in favour of Hendrik C. Poetzich, which bond, through no negligence on petitioner's part, was not lodged within the time specified by law.

Granted.

IN THE INSOLVENT ESTATE OF HENRY M. H. MILES.

Mr. Shippard applied for the appointment of a commissioner to examine the insolvent and others concerning his trade dealings and estate.

The Court made the order, and appointed Mr. Advocate Buchanan commissioner.

SMIT V. GABIER. { 1894. Mar. 20th.

This was an application for an order committing the respondent for contempt of court by reason of having disobeyed the order of 20th July, 1892, whereby he was restrained from obstructing the common passage reserved for portion of the property known as Marais' Cooperage, between Loop, Bree, and Bloem-streets.

Mr. Schreiner for applicant; respondent in person.

Respondent Gabier, on oath, deposed that he had never received a letter requesting him not to obstruct the passage. He never allowed his cart to remain longer than two hours. It never stood in the passage during one entire Sunday.

Jacobus Adrian Smit, applicant, deposed that the passage had been frequently blocked by respondent's cart. Witness had seen the cart standing in the passage for three hours outspanned.

The Court ordered the respondent not to keep his cart longer in the passage than was necessary, and if he disobeyed the order of the Court he would be committed to prison; respondent to pay the costs of this application.

IN THE INSOLVENT ESTATE OF MARGOLIUS, LEWIS AND CO.

Mr. Benjamin moved for the appointment of Edward R. Syfret and Edward W. Rice as provisional trustees of the said estate, with powers to follow up and trace certain goods believed to have been carried away with the knowledge of the insolvents a few days prior to the insolvency from Beaufort West Station.

The Court made the order.

Re ROUSSOUW'S ESTATE.

Mr. Sheil moved for an interdict restraining the sale of the farm De Plaat, in the district of Sutherland.

The Court granted a rule *nisi*, calling on the executor testamentary of this estate to show cause by 12th April next why he should not be restrained from selling, the rule to operate meanwhile as an interdict, and intimation to be sent by telegraph to the parties.

IN THE ESTATE OF THE LATE HERCULES S. DU PREEZ.

Mr. Buchanan moved for authority to the widow and executrix of the said Du Preez to mortgage the landed property of the estate, being portion of the farm Vaalkrans, in the district of Uniondale, for the amount of certain liabilities incurred by her.

The Court made an order in terms of the Master's report, making the amount £54 instead of £45.

IN THE INSOLVENT ESTATE OF SOLOMON LEWIN.

This was an application for the appointment of Messrs. Steytler and Roos as provisional trustees of the said estate, with all the powers, no election having been arrived at by the creditors attending the second meeting.

Mr. Schreiner, Q.C., for applicant.

On the motion of Mr. Rose-Innes, Q.C., for respondents, the matter was postponed till this day fortnight.

REGINA V. MOOS SOLOMON.

On the motion of Mr. Giddy, the venue was changed in this case from the Supreme Court to the Circuit Court at Worcester.

Ex parte STONE. } 1894.
Re STONE'S ESTATE. } March 27th.

Executor testamentary—Account—Extension of time.

The Court refused to grant an executor testamentary an extension of three years within which to file his final account, the estate having been open for eleven years and it being the wish of the testator that it should be wound up within three years from his decease.

Petition of James Montague Stone in his capacity as the executor testamentary in the estate of the late James John Henry Stone, who directed by his will that his estate should be wound up within three years from his death

The petitioner, to whom letters of administration were granted in 1883, was called upon by the Master to file a final account in the above-mentioned estate or otherwise to obtain an extension of time from the Court.

The petitioner alleged that he had filed interim accounts but that it would be impossible for him to file a final account for a considerable period of time—namely three years, and that it was to the interest of the heirs in the estate that time should be granted.

The main reasons assigned for asking for an extension of time were:

1. That there was landed property claimed by the estate to which no title had been obtained, and that the greatest difficulty existed in tracing the particulars of the acquisition of the same, and that in some cases he was waiting for the period of prescription to run.

2. That certain landed property in the estate had on several occasions been put up to auction, but owing in one case to no bid being offered, and in other cases the biddings being so unsatisfactory and so far below what the petitioner considered its true value, that he withdrew such property from auction.

3. That it was to the interests of the heirs that an extension of time should be given.

The prayer was for an extension of three years. The petitioner undertaking to file an account before that time if it were possible consistently with the interests of the estate.

The heirs in the Colony, with the exception of one, a lunatic, supported the petition.

It did not appear that the other heirs, some of whom lived in England and others in America, had had notice of the application, but the petitioner consented on their behalf by virtue of his holding their power of attorney.

Mr. Buchanan was heard in support of the application.

The Court made no order.

The Chief Justice said: The applicant has delay for eleven years to file an account, when it is clear that the testator wished that three years after his decease the estate should be wound up. The applicant has been repeatedly asked to file an account; he has not done so, and I think it is now time that he should do so. This application must be refused. If the applicant can satisfy the Master at any time with regard to certain assets that cannot be immediately realised, I am quite sure the Master will grant an extension of time with regard to those particular assets, but as to the funds that have come into the applicant's possession, he must file his account at once. The applicant to pay the costs *de bonis propriis*

Their lordships concurred.

[Applicant's Attorney, G. Montgomery-Walker.]

DIGEST OF CASES.

PAGE

Act 23 of 1888, Sec. 28.

An unconvicted prisoner found guilty of an offence under sec. 28 of Act. 23 of 1888 cannot be sentenced to receive lashes.

Regina v. Jantje Sly 8

Administrators—Trusts—Release.

Where persons had been appointed executors testamentary and administrators of certain trusts constituted by the will, and they had finally liquidated the estate as such executors but were still administeriny the trusts, the Court at their request relieved them from their trust, and substituted a Trust Company in their place on the Company finding security to the satisfaction of the Master of the Supreme Court.

Ex parte Kingsmill and Anderson *re* Crockart's Will 100

Ante-nuptial Contract—Delay in registration—Notary Public—Costs.

Where through the omission of a Notary Public an ante-nuptial contract was not registered within the time prescribed by law, the Court ordered the registration of the contract on condition that any expenses occasioned by the delay, including the costs of the application for registration, should be paid by the Notary.

Ex parte Van der Spuy *re* Moore and Saayman's Anne-nuptial Contract... 4

Attachment—Inheritance—Marriage in community—Judgment - Costs.

The Court ordered the attachment and sale of an inheritance, to which a woman married in community of property was entitled after the death of her surviving pa ent, to satisfy a judgment against her husband.

Swanepoel v. Birk 6

PAGE

Attorney—Professional Misconduct.

An attorney, practising in the High Court of Griqualand, having been requested by the Judges of that Court, by means of a letter addressed to him by the Registrar, to explain certain statements made by him in an affidavit in a pending case which the Judges had reason to believe were incorrect, and having been further told that if such explanation were not given further proceedings would be taken against him, answered, in effect, that he would not give any explanation by letter, but that he would reserve anything he had to say till proceedings were taken, when he would have an opportunity of making his defence on oath.

It was proved to the satisfaction of the Supreme Court that the incorrectness of the statements was caused by a mistake in a telegram received by the attorney.

Held, *that there was no ground for a charge of professional misconduct against him.*

Currey v. Incorporated Law Society—Incorporated Law Society v. Phear 15

Building Contract—Balance of account—Action—Small & Morgan v. Young 48

Collation—Debt—Insolvent's discharge—Intention—Testator—Will.

In the absence of an indication of the testator's intention to the contrary, a debt incurred to him by a child but discharged by reason of such child's insolvency and subsequent rehabilitation must be collated by such child for the purpose of ascertaining the shares of inheritance due to all the testator's children under a will

PAGE

whereby he has appointed them as heirs in equal shares.

A condition "that any sum which may be owing to the testator by his children must first be deducted from their inheritance" does not by itself afford such an indication of an intention to the contrary.

Steyn's Executors v. Steyn 75

Commission—Practice.

A person who takes out a commission should give the other side notice as to when and where the commission is to meet and witnesses be examined.

Prince, N.O. v. Adam and Zoer... ... 9

Crown—Prescription—Perpetual quitrent—Freehold.

Prescription runs against the Government in respect of land which can be alienated although the Legislature has fixed certain conditions upon which such alienation shall take place, but there must be clear proof that the occupation has been nec vi, nec clam, nec precario.

If the possessor has occupied the land in the belief that it formed part of another portion of land which he owned on perpetual quitrent tenure the Government would be justified in issuing a title on such tenure instead of freehold.

Blanckenberg v. Colonial Government 61

Dogs—Destruction of—Act 40 of 1889, section 226 — Pound Act, 1892, section 26.

The plaintiff's dog having been in a fowl-house was shot by the owner of the land whilst running through an enclosure in which no animals were kept but which was within an outer enclosed place in which the owner's ostriches were kept.

Held, *on appeal, that the owner was not liable in damages for the destruction of the dog.*

Duthie v. Benn 67

Exception — Amendment — Summons—Husband—Magistrate's discretion.

To a summons in a Magistrate's Court directed against a married woman trading in a name different from her husband's she excepted that the summons ought to have been directed to and served upon her husband also.

The plaintiff thereupon applied for leave to amend the summons and serve an amended copy on the husband, the plaintiff paying the costs of the day.

The Magistrate having refused the application,

Held on appeal, *that the Magistrate's discretion had not been unreasonably exercised.*

Smith v. Muff. trading as James & Co. 33

Executor-testamentary — Account—Extension of time.

The Court refused to grant an executor-testamentary an extension of three years within which to file his final account, the estate having been open for eleven years, and it being the wish of the testator that it should be wound up within three years from his decease.

Ex parte Stone, *re* Stone's Estate ... 108

Hotel business—Purchase on behalf of minor.

Where it was clearly for the benefit of a minor, the Court authorised the purchase for the minor of a hotel business, which had been previously carried on by his father.

Ex parte Lyons and Smith 98

Husband and wife — Injury to wife—Proper person to sue—Exception.

To a summons in an action brought by the plaintiff as the husband of H., *to whom he is married in community of property, for damages for injuries done to her and his child and property by reason of the negligence of the defendant's servant, the defendant excepted that the action ought to have been in the name of* H.

Held, *reversing the decision of the Magistrate, that the exception was*

PAGE

bad and that the husband was the proper person to sue.

Michler v. Saunders 38

Insolvency—Trustee—Proof of debt.

Where no creditors had appeared at the first or second meeting in an insolvent estate and no trustee was elected, the Court on the petition of certain creditors, authorised them to call a meeting for the proof of their debts and the election of a trustee on condition that they paid all expenses in connection with the meeting and election.

Ex parte Garlick and Ruddle 10

Jurisdiction — Magistrates Court Acts —Set-off or compensation—Reconvention—Liquidated demand—Unliquidated damages.

In an action for £2 18s., *in respect of money lent the defendant excepted to the jurisdiction on the ground that he had a counter claim for* £259, *two items of which amounting together to* £9 *constituted the purchase price of cattle but the remaining items were for unliquidated damages.*

Held, *on appeal, that the Magistrate had jurisdiction to decide upon the plaintiff's claim, inasmuch as the items of the counter claim which were capable of being pleaded in compensation were not in excess of his jurisdiction and, being distinct from the other items of the counter claim, could have been claimed in reconvention in this action.*

Jooste v. Petzer 77

Legacy—*Jus accrescendi*—Intention—Will.

A testatrix bequeathed to her two grandchildren each one hundred morgen of land, situated respectively on the north and south sides of a certain stream "as a homestead and further" certain other land.

One of the legatees died before the testatrix.

PAGE

The context of the will showed that the other land was intended to be accessory to the homestead.

Held. that the jus accrescendi *did not apply either to the homestead or to the other land bequeathed.*

Potgieter v. Van der Heever's Executor 66

Lost bond—Legal holder—Deeds Registry Act, 1891—35th Regulation.

Where it was proved to the satisfaction of the Court that the amount of a lost bond had been paid, but the declaration required by the 35th Regulation framed under the Deeds Registry Act, 1891, *could not be made as the address of the legal holder was unknown, the Court directed the cancellation of the bond.*

Ex parte Koller's Executors 32

Magistrate's jurisdiction—Set-off—Exception.

T. *sued* W. *in a Magistrate's Court for* £13 17*s. being the balance of an original account of* £57 15s. 3d. *for work and labour done.*

Annexed to the summons was an account showing how the £13 17s. *was arrived at, namely, by deducting from the* £57 15s. 3d. *the following sums :* £30 (*advanced to carry on the work*), £6 18s. (*cash supplied*), *and* £7 0s. 3d. (*goods supplied*).

W *excepted to the summons on the grounds that the amount in dispute was beyond the Magistrate's jurisdiction.*

W *gave evidence and deposed that the item of* £30 *credited in the account annexed to the summons had nothing to do with the claim for work and labour done, and that that amount had been advanced by him to* T. *to enable the latter to buy land, and that he held* T.'s *promissory note for the amount.*

He denied T's *right to set off the amount of the promissory note against*

PAGE

his claim for work and labour done. The Magistrate sustained the exception with costs.

Held on appeal, *that the Magistrate had jurisdiction, and that the case was governed by* Kruger v. Van Vuuren's Executrix (5 Juta, 162).

Theron v. Woolf 18

2 —— Splitting of claims — Abandonment of excess—*Res judicata.*

An agreement in the nature of a partnership having been dissolved by mutual consent the plaintiff rendered an account consisting of different items and showing a debit against the defendant of £239.

The parties then agreed that the defendant should make a promissory note in the plaintiff's favour for £174, *in respect of the undisputed items of the account, and that the balance of* £65 *should be subject to future adjustment.*

To a summons in a Magistrate's Court on the note after it fell due, the defendant excepted on the ground that the plaintiff had split his claims and had not abandoned his claim for the balance of £65.

Held, *overruling the Magistrate's decision, that the exception was bad inasmuch as there was not such a legal connection between the two claims as to render a final judgment on the one capable of being pleaded as* res judicata *in an action on the other.*

Van der Heever v. Van Rooyen ... 73

Minor—Maternal inheritance—Partnership.

Under special circumstances and where it was clearly for the benefit of a minor, the Court authorised the Master to pay out to the minor the amount of his maternal inheritance to enable him to enter into a business partnership with his brother.

Ex parte Coetzee 33

PAGE

2. ——Bond—Cancellation—Father and natural guardian.

Where a bond had been passed in favour of a minor, and the mortgagor was anxious to pay the amount of the bond and have it cancelled, the Court authorised the Registrar of Deeds to accept the cancellation of the bond by the minor's father as natural guardian.

The father to invest the amount of the bond for the best interests of his child.

Ex parte Hopkins 59

Municipal rate—Water rate—Valuation—Rectification of valuation—Act 12 of 1878—"Premises."

To a claim for Municipal rates under Act 12 *of* 1878 *the defence in the Magistrate's court was that the valuation of the plot of land in question included a wooden building which was movable.*

Held, *affirming the decision of the Magistrate's Court, that the valuation was conclusive in that Court and that the proper course for the defendant was, in the first instance, to apply to the Town Council to rectify the valuation, and, if the Council refused, then to apply to a Superior Court for such a rectification.*

To a claim for a water rate on the building under section 9 *of Act* 12 *of* 1878 *the defence was,* inter alia, *that the building formed part of premises owned and occupied by the defendant for which an adequate tank had been provided.*

Held, *that inasmuch as the plot with the building thereon had formerly belonged to a different owner, when a water rate was paid on the building, as the plot is separated from the rest of the defendant's property by a street, and as the building is used as an upholsterer's workshop, it cannot be regarded as part of the pre-*

PAGE

mises for which a tank exists and that therefore the water rate is payable.

Rindall v. Town Council of Graham's Town 39

Non-negotiable note — Indorsement — Aval — Surety — Consideration — Benefit of division — Benefit of excussion — Renunciation of benefits — Principal debtor—Costs of excussion.

A person endorsing a promissory note which has not been endorsed by the payee prima facie *incurs the liability of an "*aval*" or surety for the maker to the lawful holder.*

A surety who has not renounced the benefit of division is entitled to a division of the debt pro rata *between himself and others who may after him have become sureties for the same debtor in respect of the same debt.*

It is a sufficient consideration for a contract to become an additional surety, that the creditor, after accepting such additional surety, is liable to be met with the exception of division in a suit for the debt against the first surety.

The costs of an unsuccessful suit brought by the creditor against the principal debtor cannot be recovered from a surety who has renounced the benefit of excussion, nor can they be recovered from a surety who has not renounced such benefit unless such action had been previously notified to him.

The case of Hurley v. Marais (2 Juta 155) *followed.*

Klopper v. Van Straaten 101

Notary—Master of Supreme Court—Will—Registration—Grosse.

A notary before whom a notarial will has been executed is bound, upon the death of the testator, to transmit the original in his possession for registration with the Master in terms of sections 3, 6 *and* 7 *of Ordinance No.* 104.

PAGE

In case of the loss of the original the Master is justified, without further proof, in registering the notarial grosse.

The Master of the Supreme Court v. Berrange 86

2. —— Protocol—Lost deed—Fine

Where on an examination of a notary's protocol by the Commissioners it was found that one deed was missing, and the notary could give no satisfactory explanation of its absence further than by alleging that it had been lost or mislaid, the Court ordered him to file in his protocol, within six weeks from the date of the order, a true copy of the deed bearing the full amount of stamps, and stamps amounting to £2 in addition as a fine, and further ordered him to pay the costs of the application to the Court.

Colonial Government v. Schermbrucker 60

Penalty—Liquidated damages—Conditions of sale — Sale of goods — Magistrate's jurisdiction.

A stipulation in conditions of sale that the purchaser should pay five per cent for collection on non-payment of the price within three days held to be not a penalty, *but reasonable compensation for the seller's risk in employing an agent (if such percentage is payable by the seller to his agent for collection and cannot be recovered by the agent from the purchaser on payment of the amount before issue of summons).*

Upon proof, therefore, that an agent has been so employed for collection, the percentage is claimable by the seller from the purchaser.

Such percentage cannot be included in an illiquid case in a Magistrate's Court for the recovery of the price of goods sold if the amount demanded exceeds £20.

Falconer v. Behr & Co. 69

PAGE

Power of attorney—Revocation—Sale of land—*Fidei-commissum.*

Where a testamentary executor had given a power of attorney authorising the person to whom it was given to administer the estate, and the latter acting under the power had sold landed property burthened with a fidie-commissum, *the Court refused to grant an order restraining the holder of the power from giving further effect to it, leaving the applicant to his remedy by action for maladministration.*

Prins' Executor v Lind 4

Principal and agent—Commission—Irrevocable power of attorney—Assignment—Reasonable time.

An agent appointed to sell his principal's assets for distribution among his principal's creditors is not entitled to charge fees for attendances at sales of land in addition to his commission of two-and-a-half per cent. on the proceeds of such sales, nor can he charge the principal with five per cent. for collecting rents in addition to five per cent. paid to his sub-agent. A power of attorney, purporting to be irrevocable and authorising the agent "forthwith" to sell the principal's assets and pay the proceeds to his creditors, who agree not to sue him until after such distribution, but containing no formal assignment of such assets or release of the principal after distribution of such assets, may be revoked by the principal after the lapse of a reasonable time for such realisation if such revocation does not prejudice the agent.

Koch v. Mair 88

Promise by advertisement—Acceptance—Consideration—Condition—Conveyance of goods

The defendant company having published an advertisement to the effect that they would convey goods at certain rates from Port Beira to Salisbury on the arrival of certain steamers, and that for further particulars application must be made to the Company's agents at such port, discovered that the route was so difficult as to be really impracticable and instructed their agents not to forward any goods until further orders.

Held, *that there was no such definite and unconditional promise as to entitle any one of the public to damages against the company upon its refusal to convey goods from Beira to Salisbury.*

The mere acceptance of goods does not amount to a promise to convey them to their destination if no bill of lading or way bill was given, and it was verbally understood that they would be conveyed only part of the way.

Fraser v. Frank Johnson & Co ... 79

Promissory note—Lost bond—Certified copy—Stay of execution—Costs.

On the 13th December 1893 C *signed a promissory note in favour of* K. *for* £230 *payable on the 14th December,* 1893.

At the time the promissory note was signed a bond for £230 (in settlement of which the promissory note was given) *passed on the 12th June,* 1882, *by* C. *in favour of* K., *was still registered in the Deeds Office.*

K.'s *agent at the time the promissory note was signed represented to* C. *that the bond, duly cancelled, would be returned to him on the following day* (the due date of the note).

On the due date C. *tendered the amount of the promissory note on condition that the bond was delivered to him, owing however to the loss of the bond this could not be done, and* C *refused to pay the amount of the promissory note.*

K. *sued* C. *on the note and obtained judgment with costs, stay of execution being ordered pending the delivery of the bond to* C.

In a cross appeal the Court varied

PAGE

the Magistrate's judgment by inserting after the word bond the words "or a copy thereof" and authorised the Registrar of Deeds to issue a copy of the bond duly cancelled.

The Court held that the Magistrate was justified in ordering a stay of execution and in giving K. *his costs. Each party was ordered to pay his own costs of appeal.*

Koch v. Carslaw. Carslaw v Koch ... 24

Public road—Swing-gate—Fence—Act 40 of 1889.

It is not necessary that a swing-gate constructed under the 153rd section of Act 40 *of* 1889 *should swing on both sides of the fence on which it is placed.*

It is not necessary that such a fence should form part of a complete enclosure, provided that it has been constructed not for the purpose of delaying free passage over a public road, but bona fide *for the use and convenience of the owner.*

Regina v. Neethling 7

Scab Act — Knowledge of infection — Owner of sheep.

Although the existence of scab among sheep raises a presumption that the owner knew of it, such presumption may be rebutted by clear proof to the contrary.

An owner of sheep cannot be convicted of a contravention of the 7th section of Act 28 *of* 1886 *if it is proved that neither he nor his manager, employed to look after his sheep, was aware of the existence of scab among the sheep.*

Regina v. Wright 104

Senatus-Consultum Velleianum—Consideration — Suretyship—Woman—Exception.

A woman who promises to pay the amount of a debt owing by another loses the protection of the Senatus —Consultum Velleianum *if she has received good consideration for the promise.*

PAGE

The summons in a Magistrate's Court alleged that in consideration of the plaintiff releasing one C. *from custody under a writ of civil imprisonment the defendant, a woman keeping a boarding-house, promised to pay the plaintiff a certain sum of money owing by* C.

It appeared that it was for the benefit of the defendant that C., *who was a boarder with her, should be released. An exception to the summons on the ground that the defendant was a woman having been allowed,*

Held, on appeal, *that as the summons* prima facie *disclosed good consideration for the defendant's promise, the case ought to have been heard on its merits, and the case was remitted accordingly.*

Bevern's Trustee v. Kretschmar ... 26

Slander—Defamatory words spoken in anger—Absence of provocation.

In the absence of provocation it is no defence to an action for slander that the defamatory words complained of were spoken in anger.

Wilhelm v. Beamish 19

Spes successionis — Sale — Sanction by Court.

B. *and his wife by their mutual will bequeathed to one of their sons* F. *a farm, but directed that if* F. *died childless the farm should, after his and his wife's death, pass to his three brothers, or in case they predeceased him, to their lawful descendants and heirs.*

F. *became insolvent, and his interest in the farm was sold to one* N.

At the age of 61 F *was childless, although he had been married twice, his second wife being 45 years of age at the date of the petition.*

N. *having offered £825 for the contingent interest of* F.'s *three brothers and their children in the farm the Court, on the petition of* F.'s *brothers sanctioned the sale of their interest to* N *for £825, and directed the purchase*

REPORTS OF ALL CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE MONTHS OF APRIL, MAY AND JUNE, 1894.

(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE SUPREME COURT.

SUBSCRIPTION PER ANNUM, £2 2s. POST FREE.

VOL. IV.—PART II.

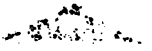
CAPE TOWN:

PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S ST.

1894.

TABLE OF CASES.

	PAGE
Adams (a minor), *re* ...	... 201
Anderson, *ex parte* ...	... 186
Arderne & Co. v. Stevens ...	... 135
Auret v. Haarhoff's Executor	... 124
Badenhorst v. Badenhorst ...	... 158
Bayly v. Bayly	... 128
Behrens v. Behrens ...	... 169
Board of Executors v. Burger	... 152
Botha and Lind v. Prins ...	169, 201
Bradshaw v. Hudson ...	... 140
Briscoe v. Rolfe	138, 152
Broad v Schultz and Smith. — *Re* Roberts's Estate ...	... 127
Brook's Estate, *re*	... 124
Bruton, *ex parte*	... 152
Budd v. Budd and Freeman ...	... 170
Burghersdorp Church v. Coetzee	... 113
Burke, *ex parte*	... 115
Cape of Good Hope Bank (in liquidation), *re*	... 125
Carey, *ex parte.—Re* Carey's Will	... 129
Carter v. Stewart.—*Ex parte* Carter	... 159
Clasen v. Grundling's Executors	... 169
Clements v. Lotter	... 152
Close, *ex parte*	... 127
Coetsee (a minor), *re* ...	... 194
Collector of Customs v. Spence and Others	... 186
Collie and Duffus v. Butler ...	... 127
Collier and Hill v. Vercuil ...	... 129
Colonial Government v. Dean	... 113
Colonial Orphan Chamber v. Muller	... 186
Combrinck (minors), *re* ...	... 152
Cooke, *ex parte*	... 168
Davis v. Baer	111, 128
De Wet, *ex parte.—Re* Estate Jones and Wife	... 126
De Villiers v. Vlok	... 157
De Villiers & Co. v. Divisional Council, Calvinia	... 158
De Witt v. Cape Canning Co.	... 116
Dickerson, *ex parte.—Re* Jamieson's Will	158
Duminy v. Prins	... 128
Dunkelsbuhler v. Liquidators Cape of Good Hope Bank ...	... 202
Du Plessis v. Ferreira ...	... 134
Du Plessis v. Du Plessis ...	... 156
Du Preez, *ex parte*	... 115
Du Preez v. Van Coller ...	... 111
Du Toit and De Waal v. Greef's Estate	157, 199
Duxburry, *ex parte*	... 186
Februarie, *ex parte*	... 152
Ferreira's Trustees v. Ferreira's Executors	... 156
Fittig, *ex parte.—Re* Liddle's Estate	... 128
Flemmer v. Van Straaten and Another	112
Fletcher & Co. v. Kimber ...	... 113
Frank & Co. v. Teague ...	... 194
Frere Hospital, East London, *re*	... 123
Gerd's Executors v. White ...	127, 186
Gibson, *ex parte*	... 168
Gibson & Morgan v. Manley and the Albert Licensing Court ...	... 196
Glynn, *ex parte*	... 124
Goldsmith, *ex parte*	... 115
Graham's Executors v. Sutherland	... 152
Greef's Executrix v. Steytler and Wilmott	... 109
Hallak's Insolvent Estate, *re* ...	... 195
Hampson v. Stuart	... 165
Hanau v. Kruger	... 168
Hand and Others v. Samey ...	... 168
Harvey v. Harvey	139, 173
Hayward v. Hayward ...	140, 158
Herbert, *ex parte.—Re* Herbert's Will	111
Heydenrych v. Vincent ...	... 158
Hiddingh, *ex parte*	... 115
Hill v. Bilborough.—*Ex parte* Hill	... 130
Hirsch, *ex parte*	... 186
Horak's Insolvent Estate, *re* ...	... 127
Horn, *ex parte*	... 186
Horne, *ex parte*	... 147
Hudson v. Bradshaw ...	124, 171
Hudson, Vreede & Co. v. Van der Westhuizen	... 139



CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.

(IN CHAMBERS).

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice BUCHANAN.]

Ex parte MCWILLIAMS. { 1894. April 2nd.

Mr. Buchanan moved for the admission of Thomas William McWilliams as attorney and notary.

The Court ordered the admission, the oaths to be taken before the R.M. of Port Elizabeth.

GREEF'S EXECUTRIX V. STEYTLER AND WILMOTT. *Re* LEWIN'S INSOLVENT ESTATE. { 1894. April 2nd.

Insolvency—Provisional trustees.

Where upon the petition of a majority of creditors representing claims amounting to £2,000 *two provisional trustees had been appointed, and no election was declared at the second meeting, the Court refused to substitute the nominee of a creditor for over* £6,000 (being the balance of the purchase price of a farm sold to the insolvent but of which he had not taken transfer) *although no notice had been given to such creditor of the application for the appointment of the provisional trustees.*

These were two applications on notice, the first for an order appointing Mr. J. H. N. Roos in place of Mr. Wilmott as joint trustee with Mr. Steytler in the insolvent estate of Saloman Lewin, of Laingsburg, and the second for an order empowering and authorising Messrs. Steytler & Wilmott as provisional trustees to administer and finally liquidate the estate.

On 28th February last Lewin's estate was sequestrated, and on the same date Messrs. G. W. Steytler and F. W. B. Wilmott, of Laingsburg, were appointed provisional trustees, with power to sell perishables.

On 16th March last a second meeting, for the election of a trustee or trustees, was held before the Master, when claims were filed amounting £9,014 by twenty-five creditors. Nineteen creditors, representing a value of £2,498 11s. 3d., voted for Steytler & Wilmott as joint trustees.

The only other person nominated as trustee was J. H. N. Ross, of Cape Town, for whom one creditor, the executrix of the late S. C. Greef, voted for a debt of £6,516 9s. 1d., represented by the balance of the unpaid purchase price (originally £7,000) and costs of the village farm Laingsburg, which had not been transferred to the insolvent.

Of the remaining five creditors, whose claims were below £30, four were represented by Steytler and one by Roos.

The Master decided that as neither party nominated had a majority in number and value no election could be declared.

The first-named applicant now alleged *inter alia* that immediately on the acceptance of the estate, and without notice to her, application was made to the Court, upon the petition of certain creditors representing claims to the amount of £2.000 or thereabouts, for the appointment of Messrs. Steytler and Wilmott, but that the petition studiously avoided to state the total amount of liabilities, and that if all the facts and figures had been fully set forth in the petition the Court would not have appointed the provisional trustees who were appointed.

That she had no objection to Steytler's appointment, but that she had grave objections to Wilmott.

She objected to Wilmott on the grounds that he had acted as agent for the insolvent in several actions lately brought by him against her husband, that Wilmott was not friendly disposed towards her, and she believed that he would endeavour to injure her as much a possible.

That Wilmott was a Special Justice of the Peace at Laingsburg, and that it was not desirable, therefore, that he should be one of the trustees.

The applicant prayed that Messrs. Steytler and Roos should be appointed and confirmed provisional trustees with all the powers.

The attorney who prepared the schedules filed an affidavit, in which he denied the allegation made by the applicant that the petition studiously avoided stating the total amount of

liabilities, or that any other facts and figures, such as are customarily submitted for the information of the Court in similar cases, were omitted therefrom either with intent or otherwise.

That he did not deem it necessary to give the applicant, or any other creditor not joining in the petition, notice thereof, such not having in his experience been previously required by any rule or practice.

That the estate was duly advertised for surrender, and the schedules were presented on the dates mentioned in the "Gazette."

Mr. Wilmott in his affidavit explained how his claim of £350 on a promissory note was made up, being chiefly law costs and advances made by him to the insolvent for witnesses' expenses.

He further alleged that with reference to the litigation which had taken place between the applicant's late husband and the insolvent, that although originally consulted by the latter on these matters, he declined to advise him thereon or to employ his own attorney, but advised him to seek independent advice.

That he consulted Mr. Charles de Smidt, of Beaufort West, and Messrs. Van Zyl & Buissinné, and under the instructions of the latter, he (Wilmott) acted as local agent in regard to such matters as they referred to him.

That although he acted professionally as such local agent, he entertained no personal feelings against the applicant, and that the belief expressed in her affidavit, that he would endeavour to injure her as much as possible, was not justified.

That in seeking for the appointment of himself as one of the trustees, he was only actuated by a desire to secure a successful realisation of the estate in the interests of himself and other creditors.

He submitted that the circumstance of his being a Special J.P. should not militate against his appointment as a trustee, and he did not see in what manner those offices would interfere with each other.

That as a resident of several years standing in Laingsburg, he was well acquainted with that place, the surrounding district and its trade, and he believed that such knowledge would greatly assist and promote a speedy and satisfactory administration of the estate, which could not be so well effected if the sole administration was conducted from Cape Town, without local management or supervision.

Mr. Schreiner, Q.C., was heard in support of the application by Greef's executrix, and directed the attention of the Court to a notice appearing in the "Gazette" of the 30th March, advertising a sale of stock on the 31st March, although the provisional trustees had only been authorised to sell perishables. He contended that notice of the original petition should have been given to the executrix and that the petition should have stated the full amount of the liabilities.

Mr. Rose Innes, Q.C., for the respondents, remarked that as to the notice of the sale in the "Gazette" it might well be that the trustees deemed "Nachtmaal" an advantageous time to sell, but that they had no intention of exceeding the powers conferred upon them by the Court. On the merits he relied on *Van Zyl's Judical Practice* p. 599; *Re Tull's Estate* (2 Juta, 369), and *Turner & Co.* v. *Schaefer* (2 Juta, 101).

The Court confirmed the appointment of Messrs. Steytler and Wilmott.

The Chief Justice said: This case illustrates how advisable it is that the fullest information should be given to the Court at the time when an application is made for the appointment of provisional trustees. It is usual for the Court when an application is made to make inquiry into the total number of creditors, claims, &c., but in the present case, no such inquiry was made because the Court really was conversant with the facts of the case, and was fully aware of Mrs. Greef's claim against the estate at the time when the provisional trustees were appointed. When the creditors met for the election there were nineteen representing £2,500, and on the other side there was only one, but she represented something like £6,000. But this is not an ordinary case where the amount of £6,000 is absolutely due; no doubt this amount is proved, but it is pretty clear that the creditors will not ratify this sale, and if they don't ratify it the only course will be for Mrs. Greef to bring her action against the trustee, and in such an action it is not at all clear that anything like £6,000 would be given as damages. We must bear in mind that Mrs. Greef is fully secured, she has the farm in her hands, and we must consider the wishes of the other creditors, who have everything to lose, whereas Mrs. Greef, in addition to holding the farm, has received, or at least her husband received, £500 from the insolvent. Now, in the competition between the two persons whose interests we are bound to consider, we must have regard to those nineteen creditors, although the total amount of heir claims is less than Mrs. Greef's. At the same time Mrs. Greef was justified in coming forward with this application and cannot be made liable for costs; so in giving full powers to these two gentlemen to administer the estate it will be on the condition that costs come out of the estate. The usual practice has been when the Court appoints provisional trustees and no election can take place afterwards, that these

persons should be appointed permanent trustees. Certain circumstances have come under our notice not quite to the credit of Mr. Wilmott, but the question is, whether they are of such a nature as would justify the Court in refusing to appoint him. The fact that he is a Special Justice of the Peace cannot be against him in this connection; he is a local man; Mr. Steytler is resident in Cape Town, and if we appoint another gentleman in Cape Town there might be a deadlock between the two, and the fate of this estate be worse than it is now. As to what has been said about the sale of the live-stock—two horses, one milch cow, five young ostriches, and twenty sheep—though it may not speak well for the provisional trustees, yet it might be shown that it was advisable to have the sale then, and I don't think the matter is of sufficient importance to justify the Court in ordering the application to stand over for further information on this matter. The Court will therefore authorise Mr. Steytler and Mr. Wilmott as provisional trustees to finally liquidate the estate; the costs to be paid out of the estate.

Mr. Justice Buchanan concurred.

[Applicant's Attorney, C. C. de Villiers; Respondent's Attorney, C. C. Silberbauer.]

DU PREEZ V. VAN COLLER. { 1894. April 2nd

This was an application for applicant's costs in an application granted on the 28th February, for the attachment of an inheritance to satisfy a judgment of £55 8s. 3d.

Mr. Searle, Q.C., was heard in support of the application, and informed the Court that when the application for the attachment of the inheritance was made there was, through an oversight, no prayer for the costs of that application.

The Court granted the order as prayed, but made no order as to the costs of the present application.

DAVIS V. BAER. { 1894. April 2nd.

Mr. Buchanan applied on behalf of petitioner, Mary Ann Davis, for attachment *ad fundandam jurisdictionem* of certain mortgaged property, and for leave to sue by edict.

The Court made theorder; personal service if possible, failing which one publication in "The Friend of the Free State," the citation to be returnable on 1st May.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. KROMBIEN. { 1894. April 10th.

Mr. Justice Upington, as judge of the week, delivered judgment in this case, which was that of a vagrant who was sentenced to three months' hard labour by the Magistrate at Kakamus, in the division of Kenhardt.

He said: A case has come before me as judge of the week, in which an old man was charged with vagrancy under section 2 of Act 23 of 1879. According to the evidence, he could obtain no employment and was driven from farm to farm He was found in a field in an exhausted condition, without food or water. The Magistrate sentenced him to three months' hard labour under the Act. The evidence in this case is not sufficient to justify the Magistrate in finding the man guilty, and the conviction might be hereafter used against him. The man was evidently in a wretched condition. It would probably be a charity to keep him in gaol, but he should be kept there as a pauper. I think the conviction should be squashed.

Ex parte HERBERT. *Re* HERBERT'S WILL. { 1894. April 10th.

Wills Ordinance, No. 15 of 1845, section 3.

Intestacy.

H. *by his will bequeathed a specific legacy of £50 to his sister and the remainder of his estate to his wife* (whom he appointed his executrix) *for the maintenance and support of herself and children.*

The will was written throughout in the handwriting of the testator but was only attested by one witness.

Held, *that the will was not a privileged will and that* H. *had died intestate.*

This was the petition of Elizabeth Cornelia Herbert (born Van der Riet), widow of the late Frederick Godfried Herbert, who died at Johannesburg on the 8th January last.

The petitioner and her husband were married by ante-nuptial contract on the 15th October, 1874.

For about twelve months previous to his going to Johannesburg in May, 1893, the deceased was employed as a clerk in Mr. Attorney Silberbauer's office, Cape Town.

In November, 1892, the deceased wrote a will which after revoking all former wills contained the following clauses:

1. *I bequeath to my sister Amelia Herbert, residing with me at Stratton Villa, Green Point, the sum of* £50.

2. *I bequeath to my wife Elizabeth Cornelia Herbert (born Van der Riet) the balance of my estate, after the payment of my just debts, for the maintenance and support of herself and children.*

3. *Any article of jewellery I leave to her to divide amongst my children in a fair and just manner and without any unpleasantness.*

And lastly, I nominate and appoint my said wife Elizabeth Cornelia Herbert (born Van der Riet) to be the executrix of my estate and guardian of my minor children.

The will bore the testator's signature but was only witnessed by one witness.

The testator did not consult Mr. Silberbauer as to his will, although the witness was a junior clerk in Mr. Silberbauer's office.

The petitioner found her husband's will, after his death, amongst others papers of his, and sent it to the Master with a request that letters of administration might be issued to her in terms of the will.

The Master refused to recognise the will as valid in consequence of its only being attested by one witness.

The petitioner alleged that the only assets in the estate were certain two policies of life assurance for £750, and that after deducting the debts due by the deceased there would only be a balance of about £400.

She further alleged that if the will were declared invalid she would be left penniless, having no means of her own, and that if the estate were administered as on intestacy the interest on the £400 would be insufficient to educate, support, and maintain her minor children.

The prayer was for an order:

1. Authorising the Master to issue letters of administration to the petitioner as executrix of her husband's estate, and of confirmation as tutor and guardian of the minor children.

2. Declaring the will to be operative according to law.

3. Further relief, with costs out of the estate.

There was abundant evidence that the will and signature were in the testator's handwriting. The witness identified his own signature, as well as the testator's, although he alleged that he had no recollection of the execution of the will.

Mr. Rose-Innes, Q.C., was heard in support the application and relied on *Voet* (28, 1, 16); *Van Leeuwen's Cen. For* (3, 2; 20); *Steer's Case* (5 Juta, 313), and *Re McCalgan* (3 Sheil, 395).

The Court refused the application.

The Chief Justice said: This does not appear to me to be a privileged will so as to dispense with the requirements of the Ordinance. The testator, after bequeathing £50 to his sister, bequeaths to his wife the balance of his estate after payment of his just debts, for the maintenance and support of herself and her children. Under the circumstances I think the will cannot be admitted, and the estate must be declared an intestate one. There can be no order on this application. The costs may come out of the estate.

[Applicant's Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. WILLAM MAYLOW. } 1894. April 12th.

Mr. Justice Buchanan said this was a case which had come before him as judge of the week, in which the Resident Magistrate of Prince Albert had on the 9th April sentenced the prisoner to twelve months' imprisonment, with fifteen lashes, for stealing a quantity of bread and other articles. There were two separate sentences, the second sentence being for a similar term of imprisonment with fifteen lashes, for an offence under the Stock Act. These sentences were to run concurrently, whatever that might mean. It seemed to his lordship that the prisoner would have to undergo two years' imprisonment and receive double lashes, if the sentence as passed were confirmed. The second sentence, therefore, would be formally quashed, and the first sentence confirmed.

PROVISIONAL CASES.

FLEMMER V. VAN STRAATEN AND ANOTHER.

Mr. Molteno applied for provisional sentence for £106 10s., less £37 2s. 6d. paid on account on a promissory note due 9th August, 1892, with interest from date.

The application was granted.

SAGAR V. ROSENKRANS.

Mr. Jones applied for provisional sentence on a mortgage bond of £200, together with interest from the 6th June, 1862.

The Court made the order, the property was declared executable.

PAARL ASSURANCE COMPANY V. MARAIS.

Mr. Maskew applied for provisional sentence on a mortgage bond for £200, together with interest from June 1, 1892, and £3 15s., premium of insurance. Counsel also asked that the property specially hypothecated should be declared executable.

The Court made the order.

FLETCHER V. KIMBER.

Mr. Jones moved for the final adjudication of the defendant's estate, and the appointment of Mr. Fletcher as provisional trustee.

The application was granted.

COLONIAL GOVERNMENT V. DEAN.

Mr. Giddy applied for provisional sentence for £3 17s. 4d., interest on a mortgage bond.

The application was granted.

MUTUAL SOCIETY V. H. VAN WYK AND ANOTHER.

Mr. Buchanan applied for provisional sentence on a mortgage bond of £250, with interest from July 1, 1893, at 6 per cent., and the property to be made executable.

The application was granted.

BURGHERSDORP CHURCH V. COETSEE.

Mr. Molteno applied for provisional sentence for £200 on a mortgage bond, with 6 per cent. interest from July 1, 1892.

The application was granted.

JAGGER V. PFUHL.

Mr. Searle, Q.C., applied for judgment for the sum of £250 11s. 10d., balance of account for goods sold and delivered.

The application was granted.

R. M. ROSS V. LOUW.

Mr. Buchanan applied for judgment for £3 13s. 9d., for goods sold and delivered.

The application was granted.

WILL V. MORKEL.

Mr. Webber applied for judgment, under rule 320, for £33 6s. 3d.

The application was granted.

NANNUCCI V. PEDERSEN. { 1894. April 12th.

Mr. Schreiner, Q.C., moved for provisional sentence upon a promissory note for £25 due on the 13th February, 1894.

The defence set up by the defendants was that they had a claim of £1,000 damages against the plaintiff for breach of contract, in that on the 5th January last they entered into an agreement with the plaintiff for the sale of his business and stock then carried on and possessed by him in Cape Town.

That at the time the agreement was concluded the plaintiff represented to the defendants that he had stock to the amount of from £5,000 to £7,000, part thereof being in his store but the greater part in the Government bonding warehouse.

That on the defendants taking possession of the stock they discovered that it only amounted to £500 or thereabouts.

That they had effected sales but were unable to make delivery in consequence of the articles not being in stock.

That the promissory note for £25 (now sued on) was given for money paid by the plaintiff to one of the defendants as travelling expenses as traveller for the firm and in obtaining orders for goods which orders he was enable to execute.

The defendants alleged that they had sustained damage to the amount of £1,000 for the recovery of which they were instituting an action against the plaintiff.

Mr. Searle, Q.C., appeared for the defendants.

The Court granted provisional sentence.

The Chief Justice said: The plaintiff sues upon an unconditional promise to pay £25. A claim for unliquidated damages in respect of a breach of contract has been set up. It is perfectly clear that if an action for unliquidated damages brought by the defendant had been successful there would have been some connection between such an action and the promissory note. It is now alleged that when the £25 was lent this money was to be devoted towards the payment of the travelling expenses of the defendant, who was to go about and sell the goods which plaintiff had sold. In the absence of clear proof to the contrary the promissory note for £25 must be treated as quite apart from the transaction of the sale. Provisional sentence will be granted. Of course, if the defendant can find security there will be a stay of execution.

[Plaintiff's Attorney, A. McLeod; Defendants' Attorney, Messrs. Tredgold & Co.]

Ex parte MILLIGAN. { 1894. April 12th.

Scotch Law Agent—Application for admission as an attorney of the Supreme Court —Charter of Justice, Section 19.

A Scotch Law Agent, not being a Writer to the Signet, who is qualified to practise in the Sheriff Courts in Scotland, but who has not paid the fees necessary to qualify him to practise before the Court of Session, is not entitled to be admitted as an attorney of the Supreme Court.

He may however be admitted to practise in Circuit Courts under Rule of Court 198.

This was an application on notice to the Secretary of the Incorporated Law Society in the following terms:

Please to take notice that application will be made to the Honourable the Supreme Court on Tuesday the 27th day of March: 1894, at ten o'clock in the forenoon, or so soon thereafter as counsel can be heard, for the admission of the above-named Robert Milligan as an attorney to this Honourable Court.

The petitioner alleged that he resided in Cape Town, and that on the 2nd March, 1883, he was duly admitted to practise under the provisions of the Law Agents Act (36 & 37 Vic., cap. 63), in any of the Courts in Scotland and that he was still entitled to practise in such Courts of law.

The petitioner annexed his certificate of admission.

The petitioner further alleged that prior to his admission under the Law Agents (Scotland) Act, 1873 (*36 & 37 Vic., cap. 63), he served under articles with one Hewat, a solicitor practising at Castle Douglas in Scotland for upwards of five years.

That on his admission under the Act he paid the stamp duties required by law, and which covered admission to any of the Courts of law in Scotland.

That he had actually practised for some time in the Sheriff Courts for the counties of Aberdeen and Kincardine, and that the only other formality required to be complied with by him, before he would be entitled to practise in any of the other Courts of law in Scotland, would be the payment of a registration fee of 5s. and the subscribing of the roll of practitioners of that Court, *save also that £30 stamp duty would in addition have to be paid for admission to the Court of Session.*

The prayer was that the applicant might be admitted as an attorney of the Supreme Court.

Mr, Searle, Q.C., was heard in support of the application. He referred to section 17 (36 & 37 Vic., cap. 63) which provides that an enrolled law agent, who has paid the stamp duty exigible by law on admission to practise as an agent in the Sheriff Court, shall be qualified to sign the roll of agents practising in the Court of Session on paying the difference between such duty and the duty chargeable on admission to practise in the Court of Session.

He contended that under this section the applicant was entitled on signing the roll to practise in the Court of Session although he had not gone through that formality.

The 19th section of the Charter of Justice only referred to Writers to the Signet, but all practitioners in Scotland are, under the Statute, denominated law agents, and there is no difference in their examination. (See also rule of Court 293.) Under Rule 198 the applicant was entitled to be admitted as an attorney in Circuit Courts. In former times it may have been necessary that Circuit Court attorneys should have had a different qualification to that held by attorneys of the Supreme Court, but this distinction was no longer necessary nor advisable. It were much better to have a uniform qualication.

He also referred to Rule 151 and to the following cases. *Lance's Case* (Buch, 1879: p. 78); *Craig's Case* (9 Juta, 295), and *Kemlo's Case* (9 Juta, 305).

Mr. Rose-Innes, Q.C., for the Incorporated Law Society: The applicant is not entitled to be admitted as an attorney of the Supreme Court.

He is not a Writer to the Signet. He is a law agent, that term includes all legal practitioners in Scotland.

Some practise before the Court of Session, and others only in the Sheriff Courts. The applicant is amongst the latter class. Not having paid

---

* Section I of this Act defines the term Law Agent to mean and include Writers to the Signet, solicitors in the Supreme Courts, procurators in any Sheriff Court, and every person entitled to practise as an Agent in a Court of law in Scotland.

When any Law Agent is enrolled under the provisions of the Act, conformably to certificate of enrolment produced in Court, he is entitled to practise in accordance with section II. of the Act, which provides that; *No person shall be admitted as a Law Agent in Scotland except in accordance with the provisions of this Act. Every enrolled Law Agent shall be deemed to be admitted, and subject to the provisions of this Act with respect to Stamp Duty and subscribing the roll of Law Agents appointed to be kept for the Court of Session and the several Sheriff Courts respectively, shall be entitled to practise in any Court of law in Scotland.*

the necessary fees he is not entitled to practise before the Court of Session.

The facts are very much the same as in *Craig's Case*, in which an additional year's service was ordered.

In *Kemlo's Case* the admission was ordered under Rule 198.

Mr. Searle, Q.C., in reply.

The Chief Justice said: In my opinion, the applicant is not entitled to be admitted an attorney of this Court, inasmuch as he is not entitled to practise as a law agent before the Court of Session in Scotland; and until such admission has taken place there, he cannot be admitted here. It is only fair, however, for the Court to express an opinion as to whether he would be entitled in case he should hereafter be admitted to practise before the Court of Session in Scotland. There is a precedent in Montgomery Walker's case. My opinion is that the decision come to in that case simply carried out the true object and scope of the 19th section of the Charter of Justice. In my opinion the privilege ought to be extended to law agents entitled to practise in the Court of Session in Scotland. Although this application must be refused, we think that when the applicant has subscribed to the roll of the Court of Session in Scotland, he may be admitted. The applicant will be admitted to practise in Circuit Courts of this colony.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Attorneys for the Law Society, Messrs. Van Zyl & Buissinné.]

REHABILITATIONS.

Rehabilitation was granted to Hercules Petrus du Preez; the application of Mr. Maskew on behalf of Gerhardus Jacobus du Toit was adjourned until May 1; rehabilitation was granted to Petrus Cornelis Hiddingh, Harriet Jane Wood Wood, William Rowland Burke, Gideon Johannes van Zyl, sen., and George Goldsmith.

LEWIS V. HOLT AND HOLT. { 1894. April 12th.

Trade-mark Cigarettes—Maker's name—Illegal use of—Interdict.

Where a trade-mark consisting of the words "The Noted Camp Cigarettes" *was sold by order of Court, but the maker's name formed no part of the trade-mark, the purchasers were restrained by interdict from using the maker's name in conjunction with the words* "The Noted Camp Cigarettes."

Mr. Schreiner, Q.C., applied for an interdict restraining the respondents from using the name, initials, and monogram of the applicant in connection with the manufacture and sale by them of certain cigarettes, and from holding out to the public that they are manufactured in Kimberley, and also from using the representation of a certain gold medal granted to applicant for cigarettes by the S.A. Exhibition of 1892.

The facts as shown by affidavits were that Lewis at present carried on business at Kimberley as a manufacturer of cigarettes. Holt & Holt carry on a similar business at Port Elizabeth. One of the respondents has a branch business in Kimberley, but their manufactory is at Port Elizabeth. In 1891 one of the respondents entered into a contract of partnership with Lewis for two years, until the 1st September, 1893. In 1893 he was to receive a one-third share, and the applicant was to receive a two-thirds share. In the same year differences arose between Lewis and Holt, and Holt obtained the appointment of a receiver. Mr. Gardner, secretary of the Griqualand West Board of Executors, being appointed on the 1st September, 1893. The trustee had the power to sell all the assets of the partnership except a certain trade-mark bearing the words "The Noted Camp Cigarettes." Thereafter, however, it was found necessary to realise this asset, and a special order of Court was made authorising the sale of the trade-mark by auction. An advertisement was thereupon inserted in the newspapers and Messrs. Vine & Co. were the auctioneers. To the sale of the trade-mark applicant made no objection, but he protested in writing before the sale against the sale of certain labels, 100,000 in number, which had his name or initials upon them. The trade-mark sold consisted only of the words, printed in a square, "The Noted Camp Cigarette." Lewis had made cigarettes since 1886, and was a noted maker. Applicant contended that respondents were not entitled to use the name of Lewis at all. The cigarettes made by Holt at Port Elizabeth were sold at a low price compared with those sold by applicant and made in Kimberley. Applicant had protested all along against the name of "Lewis" being used by respondents.

The respondents claimed that when they bought the 100,000 labels they bought them under an order of the Court, with the right to use them; and that when these labels were exhausted, they claimed the right to use the name of "Lewis" in connection with "Camp Cigarettes." They claimed that the term "Lewis's Camp Cigarettes" was a trade asset of the firm of Lewis & Holt, and that this cigarette was a distinct article, and could not be

separated from the trade-mark. Respondents claimed the right, as soon as the 100,000 purchased lables were used, to put upon the labels covering the cigarettes manufactured by them the term "Lewis's Camp Cigarettes."

Mr. Innes, Q.C., for the respondents.

The Court granted the interdict.

The Chief Justice said: Whatever rights the respondents may have purchased they certainly did not purchase the right of making cigarettes and holding out to the public that these cigarettes were manufactured by Lewis. They purchased at the sale the trade-mark, which really only consists of the words, "The Noted Camp Cigarettes." They also purchased a large number of labels, but at the time of the purchase a protest was made on behalf of Lewis against the use of these labels, and the applicant offered to purchase the labels and destroy them in the respondents' presence. This offer was refused. In my opinion any person purchasing these cigarettes is led to believe that they have been manufactured by Lewis, and that, clearly, respondents have no right to represent to the public. The applicant is, in my opinion, quite within his rights in asking the Court to restrain the respondents from selling any cigarettes with labels holding out to the public that such cigarettes have been manufactured by Lewis. Such an order will be made, respondents to pay the costs. If the words "Lewis's Noted Camp Cigarettes" appeared on the label together with a clear intimation in distinct terms that the cigarettes were manufactured by the Port Elizabeth Tobacco Company or by Holt & Holt, and not by Lewis, I think no fraud would have been committed on Lewis, and at the same time purchasers would have the benefit of their purchase.

[Applicant's Attorneys, Messrs. Findlay & Tait; Respondents' Attorneys, Messrs. Scanlen & Syfret.]

DE WITT V. CAPE CANNING COMPANY. | 1894. Feb. 21st. April 13th.

Architect—Unapproved plans and specifications—Quantities.

An architect is not entitled to any remuneration for preparing plans and specifications unless they are approved of and adopted by the person engaging him.

If however an architect is instructed to take out quantities he is entitled to fair remuneration for his work.

This was an action to recover £77 8s. for professional services rendered by the plaintiff to the defendant company.

The declaration alleged that the plaintiff was an architect practising in Cape Town, and that the defendant was the secretary of the Cape Canning Company, which carries on business in Cape Town.

That in the month of October, 1893, at the special instance and request of the said company, conveyed through its duly-appointed manager, as its lawful representative and agent, the plaintiff undertook to perform certain work, labour, and services as an architect in and about the preparation of plans and specifications for the erection of certain buildings for the said company.

That the plaintiff thereafter duly performed the said work and labour, and rendered the said services in all respects in accordance with the instructions of the said company, and duly delivered the said plans and specifications to the defendant.

That thereupon the defendant, in his said capacity, became and was indebted to the plaintiff in respect of the said work and labour and services in the sum of £77 8s., which is the customary and reasonable charge in the absence of special agreement in respect of such work, labour, and services, being the amount of 2½ per cent. on the amount of the lowest tender sent in to the defendant for the construction of the buildings according to the said plans and specifications; but after lawful demand the defendant refuses to pay the said sum of £77 8s. or any part thereof.

Wherefore the plaintiff prays for judgment for the said sum of £77 8s., or that by way of judgment for a "quantum meruit," or otherwise the plaintiff may have such further or other relief as to this honourable Court may seem meet, together with costs of suit.

The defendant in his plea said that in or about October, 1893, the defendant company, through its secretary and manager, requested plaintiff to send in certain designs and plans for a building which they proposed constructing. The plaintiff was informed at the time that other architects were also being asked to send in plans, that the company would select the plan which appeared the most suitable in respect of cost, accommodation, and other particulars, and that the unsuccessful competitors would receive no remuneration. The plaintiff agreed to prepare and send in plans upon these terms and conditions.

Four architects, amongst whom was the plaintiff, sent in plans upon these conditions, and the plans of one were selected. The plain-

tiff was an unsuccessful competitor and the plans prepared by him were returned, and he is therefore, in terms of the agreement above set forth, not entitled to recover any sum of money from the defendant company.

The defendant prayed that the plaintiff's claim might be dismissed with costs.

The replication was general, and the issue was joined on these pleadings.

Mr. Schreiner, Q.C., and Mr. Watermeyer appeared for the plaintiff, and Mr. Searle, Q.C., and Mr. Jones for the defendant company.

Anthony Marthinus de Witt, plaintiff, deposed: I am an architect, and reside in Cape Town. I prepared the plans for the lobster factory at Woodstock. Shortly after my return from England in October, 1893, Mr. Strasburger, manager of the Cape Canning Company, came to my office and gave me instructions for plans, which he desired me to draw for a factory and cottage which the defendant company proposed to build. He told me that plans had been prepared by Messrs. Stent and Ransome, which were not satisfactory. I went and inspected the site, and with the information supplied I prepared my plans and duly submitted them. Mr. Strasburger previously told me that Mr. Freeman had been approached on the subject, but as he had not sent in any plans, he (Mr. Strasburger) came to the conclusion that Mr. Freeman did not care for the job. Mr. Strasburger did not intimate to me that I was to compete with other architects. I have never heard of private competition amongst architects. I afterwards had an interview with Mr. Batezat, the secretary of the company. He had plans in his possession prepared by Messrs. Stent and Ransome. On October 23 I sent in my estimate, £3,000 for the factory, and £700 for the cottage. Two days afterwards Mr. Sherbert, one of the directors of the company, and Mr. Batezat called on me and brought the plans and specifications back. They gave me instructions to reduce the estimate on the cottage, which I did. Mention was also made of the roof—what it would cost to bring an iron roof from England. I had a cable from England on this, and in my specifications I notified to tenderers that £1,000 should be allowed for the roof, which would be delivered on the ground. On 31st October advertisements appeared calling for tenders. The tenderers were referred to me for information. On the Monday following I had an interview with Strasburger. He asked if a wooden roof would be cheaper than an iron roof. I said I thought it might be £100 less. He then told me Freeman and Ransome had also sent in plans. That was the first I heard about Freeman. I was very much astonished. In the afternoon I saw Mr. Graaff. He told me that Dickson was the lowest tenderer, and asked if I knew if he was a good man. I wrote the company on the 8th, and they replied briefly, stating that they had decided to accept the lowest tender on Mr. Freeman's plans. They returned my plans and specifications, and I sent them back, saying the plans were theirs, not mine. The plans were again returned to me, and I kept them. I then consulted my attorneys, and threatened legal proceedings; the company replied repudiating liability.

Cross-examined by Mr. Searle: I am not aware that a number of plans were submitted to the shareholders. The position I take up is that they were bound to pay me whether they approved of my plans or not.

By the Court: You do not need to take out a licence as an architect in the Colony. I am not a member of the Institute of Architects. I maintain that if an architect is asked to prepare plans he is entitled to payment, perhaps 1½ per cent. on the estimated cost of the building.

William J. C. Perkins, clerk in the employment of plaintiff, spoke to having been present at the office when Mr. Strasburger and Mr. Batezat called to give Mr. De Witt instructions.

Alfred John Dickson, builder and contractor, deposed that he visited the Canning Company's offices; was shown the plans, and heard no other name mentioned but De Witt's. Witness was referred to Mr. De Witt for information.

Cross-examined: Mr. Batezat may have said that there were other architects, but he did not recollect.

Charles Williams, James Stark, and Robert Mitchell, builders and contractors, gave similar evidence.

John Parker, architect, deposed that 2½ per cent. on the amount of Mr. Dickson's tender would be a fair charge. That was the custom of the Royal Institute of British Architects. If plans were not approved, the architect was at the mercy of his client. Personally he had always received something.

Henry James Hunter, George Clarke, and Thomas Maynard, contractors, who had tendered, spoke of having been referred to Mr. De Witt by the Canning Company.

Mr. George Ransome, architect, deposed that he first heard of De Witt sending in plans at the time tenders were called for. Witness was asked to prepare a third plan. No mention was made at the time of De Witt. He afterwards took his plans away from the company, and sent a circular round to the builders. Had the plans been approved a reasonable charge would have been 2½ per cent. If they were not approved he would get nothing. Witness knew

he was competing. If plans were prepared according to instructions and specifications framed, that would be equivalent to acceptance of the plans.

This closed the plaintiff's case.

For the defence,

Henry Batezat, secretary of the Canning Company, deposed: I have seen Mr. De Witt with Mr. Strasburger. There was a meeting of the company on the 24th October. Plans and estimates were laid before the meeting. Ransome sent in two plans. In the course of an interview with plaintiff he told me he had been given dimensions for our factory. I then mentioned we had plans from Messrs. Stent and Ransome, which had not been taken into consideration owing to the price. I distinctly mentioned that both Mr. Stent and Mr. Ransome were preparing fresh plans, and that Mr. Freeman was also preparing plans. I told him he might prepare plans too if he cared, and they would be all submitted to the shareholders, who would decide. Plaintiff said, "All right," and mentioned that he had built the Woodstock factory. Subsequently plaintiff saw me at my office. Mr. Ransome's plan was lying on my desk. He asked if he might have a look at it. He said, "Is not this a shame—he is actually copying my factory at Woodstock?" I said that the dimensions—so many windows on one side, &c., were all the same, and the plans were bound to resemble each other. He afterwards sent in plans and estimates. Freeman and Ransome did the same. When I told De Witt this he said, "Oh, are there other architects besides myself?" I said certainly there were. I had given him to understand that all along. The plans were put before the meeting, and Mr. Scott's tender on Mr. Freeman's plans was accepted.

Cross-examined by Mr. Schreiner, Q.C.: I repeatedly told De Witt there were other architects competing. I did so in order to get cheap plans. When he said, "Oh, there are other architects?" I took it as a good joke.

Charles Freeman, architect, deposed he was one of the competitors, and had the same instructions as the other architects. He usually charged 2½ per cent. if the plans were approved.

Lucien Strasburger, manager of the Cape Canning Factory, deposed: Last September it was decided to obtain an estimate of the cost of building a factory for the Cape Canning Company. I was instructed to see architects for that purpose, and I saw Mr. Stent, Mr. Ransome, and Mr. Freeman. Mr. De Witt was in Europe. He had made plans for the Woodstock factory. He arrived from Europe in October. On instructions from the company I saw him. I told him I had left my old company at Woodstock, and gave him a few explanations in a friendly way, and that I was starting a new company. I told him we were probably going to build in the Dock-road, and that we had asked for plans from three architects already. I told him also that the two plans of Stent and Ransome were high in their estimates; that they were making new ones; that Mr. Freeman had not yet sent in plans or estimate, and that if he was willing to compete I would give him all particulars, also saying that the building was to be very simple and cheap. Mr. De Witt said he knew all about it, as he had seen Mr. Attwell in London. Mr. Attwell is one of the directors of the Cape Canning Company. Then I gave Mr. De Witt particulars as to the building required. He took notes. I told him we should accept the plans which were the most suitable, and at the cheapest cost, by competition. After that the new plans from Mr. Stent and Mr. Ransome came in again, with a lower cost than the first time. The second plan of Mr. Stent was not suitable at all; the plan of Mr. Ransome was a good plan, but rather high in cost. There was a meeting of the directors called on October 24. After that meeting I went to Mr. De Witt's office again, and I told him that the plans of the three other architects had come, and that we were ready to make a decision, and we were waiting for him. Mr. De Witt was very busy. I don't know what papers were lying about, or whether they were specifications or not. I told him we had a meeting called for the 3rd November. He told me he would not be ready, and asked for postponement until the 6th November. I showed a written advertisement intended to be published in the newspapers calling for tenders to Mr. De Witt. He said that the advertisement was not drawn up in proper form, and asked to be allowed to correct it. I said "With pleasure," and he corrected it. The advertisement as amended appeared in the two newspapers on the 31st October and two following days. I went around to all the architects except Mr. Stent. Mr. De Witt sent plans and specifications to the company's office, but I was not there when they came. When Mr. Ransome and Mr. Freeman saw the papers asking for tenders, they asked if we would mind them going to their own contractors. I said we had no objection. I saw Mr. De Witt again in the office of the company, and he looked at Mr. Ransome's plan. He said, "Isn't it a shame they have copied my plan of Woodstock?" The plaintiff was the architect of the Woodstock works. On several occasions afterwards I saw Mr. De Witt, and also went over the ground with

him. On the Saturday before the meeting I saw Mr. De Witt take notes—I suppose of the number of tenders. On the day of meeting I saw Mr. De Witt about the roof, and asked what it would cost for a wooden instead of an iron roof. He said it might cost £100 less for a wooden roof. The iron roof fell down at Woodstock, so that I was against iron roofs. I never said the plans would be paid for or not paid for. I only said there was competition.

Cross-examined by Mr. Schreiner, Q.C.: The particulars were in the office of Mr. De Witt. I was not constantly at Mr. De Witt's office. I went perhaps five or six times. I did not say that Freeman was too busy to go in for the competition. We went to De Witt because we thought his experience at Woodstock would be useful. I went to Mr. De Witt's office and told him the plans of the other architects were in the hands of the company. Mr. De Witt told me he was not ready. An advertisement as amended by Mr. De Witt was inserted in the "Cape Times" and the "Cape Argus." The meeting was to decide what plans would be accepted. I told Mr. De Witt we were waiting for him. I understood the roof was to be delivered to the contractor for £1,000, but I did not like this as Mr. De Witt, on behalf of the other company, had imported an iron roof for Woodstock which was not a success.

By the Court: We adopted the plans of Mr. Freeman at the meeting on November 6. I could not say whether Mr. Freeman saw Mr. De Witt's plans before he (Mr. Freeman) sent in his plans in competition. There was no competition in the building of the Woodstock factory. I did not lead Mr. De Witt to understand that he was employed as the architect. He was merely to be a competitor.

Anthony de Witt, the plaintiff, recalled, deposed: I did not import the roof for the Woodstock factory. There was no competition in the case of Woodstock. The secretary of the Woodstock Company imported the roof, and when it came out it was found to be all wrong. I should not get any commission beyond the usual 5 per cent. If the roof had cost £1,200 instead of £1,000 I should have had to pay the difference.

Cross-examined by Mr. Searle, Q.C.: I was asked what would be the difference in cost between a wooden and an iron roof. This was after the tenders had been sent in. If the question had been asked before the tenders were sent in then an alternative tender would have been submitted.

By the Court: I have never framed plans and specifications without being paid for my work.

Mr. Schreiner, Q.C., for the plaintiff: On the pleadings the case is very much an issue of fact. The defence that by custom architects are not paid for unaccepted work has been suggested by the Court but has not been raised on the pleadings. The sole issue of fact is whether the defendant company employed De Witt or not. Clearly they did, and the plaintiff is entitled to payment for his plans and specifications, and he would have a good claim for this even if the company had said to him, we don't intend to go on.

As a defence they now raise the question of competition. That is an issue of fact.

The Chief Justice: If the Court should hold on the issue of fact that the parties were not *ad idem*, would the Court not fall back on the general principle that an architect is not entitled to payment unless his plans, &c., have been accepted?

There does not appear to be much misunderstanding as to the facts. Strasburger approached De Witt because Ransome and Stent were out of the competition and as Freeman had not sent in plans (and there comes in the neat issue) the company thought he did not intend to compete, and so they went to De Witt.

Even granting that the company had an idea of competition, if they came to De Witt under such circumstances is it not a fair inference that they employed him as an architect, and as to this De Witt's evidence is borne out by the correspondence.

In any case the plaintiff is entitled to a *quantum meruit*, the promise to pay being implied by law. See *Prickett* v. *Badger* (26 I.J. C.P., p. 33).

The Chief Justice: Here an architect is only entitled to payment if his plans have been approved. His previous work is conditional. If it were otherwise an architect might prepare very bad plans and be still entitled to a *quantum meruit*.

That cannot apply in the present case, because here the plans have been prepared by a man of high standing in his profession, they are well within the limits assigned, and consequently he is entitled to remuneration.

In England a surveyor and an architect are distinct. The architect draws up the specifications and the surveyor the quantities, and even if the specifications are not accepted the surveyor can sue for the quantities on a *quantum meruit*. See *Moor* v. *Witney Union* (3 Bing, N.C., 814).

So here when De Witt has gone further than to prepare plans and specifications and the employer has instructed him to take out bills of quantities he is entitled to a *quantum meruit*,

The Chief Justice: In the case you have just cited the architect was the agent of the persons who were building.

Ubi jus ibi remedium, and so De Witt must be able to sue the company just as a surveyor can sue an architect in England, because De Witt cannot sue himself.

Mr. Justice Buchannan: You say that subsequent to the meeting of the 24th October the Company instructed De Witt to take out quantities?

Yes, and tenders came in well within the figures specified, and the company must pay for the work done.

Mr. Justice Buchannan: There is something in that, but the declaration only refers to plans and specifications and makes no reference to quantities.

That is so, but this argument only arose out of what fell from the Court at the first hearing, and an amendment of the declaration ought to be allowed.

Again the quantities are really part of the plans and specifications, and are usually affixed to them, and were advertised to be seen with them.

The fact that the plaintiff was asked to take out quantities is a strong presumption that the company had employed him, and if they did not clearly tell him that there was to be a competition, and if reasonable tenders came in the company cannot be heard to deny employment. By custom in the building trade, even if the architect's plans are rejected the surveyor must be paid. See *Taylor* v. *Hall*, (4 I.R.C.L. p. 467). A surveyor making wrong plans cannot sue. *Moneypenny* v. *Hartland and Others* (1 C. & P., 352)—but throughout the case it was assumed that a building surveyor can recover if he does his work correctly, even though the building is not proceeded with.

The Chief Justice: It would be going very far indeed to imply a contract from the taking out of quantities,

Mr. Searle, Q.C.: The plaintiff must prove that he is entitled to £70 on some contract. He says he did not know of any competition, though he knew that other architects had sent in plans.

The minutes written before any litigation was thought of are so clear as to the intention of the Board that Batezat and Strasburger could not have entered into the contract deposed to by the plaintiff, knowing as they did what was in the minutes.

The Chief Justice: Should not the unaccepted plans have been absolutely repudiated and are not the company liable, seeing that they used De Witt's plans as a basis and showed them to tenderers?

But De Witt knew there were other architects to compete.

The Chief Justice: If the Court must fall back on the implied contract, would not the fact that the plans were made some use of entitle the plaintiff to some payment?

No, the plans are useless until they have been accepted and approved.

The declaration says nothing about quantities and only claims for "plans and specifications."

Quantities are always a matter between architect and builder.

The Chief Justice: If the declaration is allowed to be amended so as to include a claim for the quantities, will you tender anything?

Mr. Searle, Q.C.: We will tender ten guineas.

Mr. Schreiner, Q.C.: I apply for leave to amend the declaration by inserting in paragraph 3 the words "and the taking out of quantities."

Mr. Searle, Q.C.: If this amendment is allowed then I would ask to amend the plea by tendering £15 for quantities and Magistrate's Court costs to date of plea.

Mr. Schreiner, Q.C.: The amount tendered is inadequate in view of the professional tariff of 2½ per cent. and the amendment would be inconsistent with the rest of the plea.

The Court allowed neither amendment, but granted absolution from the instance with costs.

The Chief Justice said: Upon the facts of this case we are of opinion that the information of the plaintiff before he made any plans or specifications was sufficient to enable him to know that there was a competition amongst architects for the right of designing the buildings intended to be erected by the defendant company. The information given, according to the evidence of the defendants, was that besides plaintiff there were other architects to be employed, and that from that information he might have known he was only one of several competitors, and that only the successful competitor would be entitled to any remuneration. But we still think that the facts do not altogether bear out this conclusion. Even then, however, the plaintiff has failed to be entitled to recover anything. The plaintiff seeks to recover remuneration for certain plans and specifications made by himself as architect for the defendants. In my opinion he is not entitled to any remuneration for these plans and specifications until they have been approved of by his employers. The plaintiff in his evidence says that a lawyer or a doctor would be entitled to his fees, and that an architect stands in exactly the same position. In my opinion an architect stands in a different position altogether. An architect is requested to make designs which his employer can make use of,

If he fails he has performed no service whatever for the employer in respect of which he is entitled to remuneration. He takes his risk of his plans and specification being approved; and if they are not approved he is not entitled to payment. The present case is a peculiar one in this respect, that after the plaintiff had sent in his plans and specifications he was requested by the defendants further to take out quantities. This was done clearly with the object of enabling tenderers for the contract to know exactly upon what basis they were to tender. I think that was no part of the architect's duties, and had there been a claim in the declaration for these quantities, he would have been entitled to fair and reasonable remuneration for the work so done; and for myself, I am inclined to think that the £15 tendered by defendants would have been fair remuneration for this work. No doubt, as a general rule, the architect charges the builder 2½ per cent., but that is a custom which I think is by no means to be approved of. It appears that architects in England are not entitled to enter into such an arrangement with the builder, except with the consent of the employer. There is not sufficient evidence before us to enable us to decide what would have been a fair remuneration in case there had been a claim in the declaration for the taking out of quantities. The plaintiff is not entitled to anything in respect of the plans and specifications; but he is entitled to recover in respect of taking out quantities, and if there had been a claim for these quantities in the declaration, judgment would have been given to that effect. Plaintiff asked to amend by inserting the word "quantities." To that amendment the defendants proposed to add a plea, and to tender £15 together with Magistrate's Court costs up to date of plea. This seems to me to be a very fair tender. In my opinion the Court would not have gone further than that. If we had given costs against the defendants they would not have been more than Magistrate's Court costs. Upon the declaration, therefore, I think no judgment can be given. There will be absolution from the instance with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinne; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

Ex parte STRAUSS. { 1894. April 13th.

Fidei-commissum — Lapse — Death of the Fidei-commissaries in the lifetime of the Fiduciary.

In 1854 *the parents of* S. *by their mutual will bequeathed to her, after the death of the survivor, the usufruct of two farms with remainder to her two children.*

S.'s *mother died in* 1858 *and the surviving spouse adiated.*

S.'s *two children died in* 1860 *in their mother's lifetime.*

In 1868 S.'s *father, who died in* 1873, *transferred to her the two farms* subject to the terms of the will.

Thereafter on the petition of S, *the Court authorised an amendment of the transfer deed of* 1868 *by freeing it from the terms of the will.*

This was the petition of Helena Judith Maria Strauss (born Louw), now married in community of property to Frederick Johannes Strauss, and by him assisted as far as need be.

On the 6th September, 1848, the petitioner was married in community to one William Henry Fryer, from whom she was divorced in January, 1851.

By her marriage with Fryer the petitioner had two children, who died in 1860 without leaving issue.

On 24th November, 1851, the petitioner was married in community to one Jacobus Arnoldus Mostert, and on 22nd December, 1855, she was divorced.

Of the last-mentioned marriage with Mostert (who is still alive) one child, a girl was born on 1st October, 1853, and is still living and married in community to one Louw, by whom she has issue.

On 4th December, 1858, the petitioner was again married without community to the aforesaid William Henry Fryer, who died on 8th July, 1860, one child, a girl, being born of the marriage on 13th February, 1861.

This child is still living, and is married in community to one Richard Charles Fryer, by whom she has issue.

On 20th September, 1862, the petitioner was married in community to her present husband, by whom she has three children, all of whom are married in community and have issue.

On 4th January, 1854, the petitioner's parents made a mutual will by which they bequeathed *inter alia* two farms apiece to their two daughters, the petitioner being one, after the death of the surviving spouse, and subject to the following condition:

That the farms or any portion thereof shall not be sold, mortgaged, alienated, or in any other

way disposed of by their daughters, but that they shall only enjoy the life-long usufruct or profits thereof for the maintenance of themselves and also of their children, to whom *the farms aforementioned shall devolve and pass.*

On 13th September, 1858, the petitioner's mother died.

On 27th November, 1868, the petitioner's father who died in November, 1873, transferred the two farms, bequeathed to her by the mutual will *subject to the said will and testament.*

The petitioner now contended that by reason of the death of her two children (by her first marriage with Fryer) before her and without having left issue, she was entitled to have the two farms released from the burden of the *fidei-commissum*, and that they vested in her out and out, so as to be liable for her debts during her life and to pass to her heirs at her death.

The prayer was for an order to amend the deed of transfer executed in the petitioner's favour on the 27th November, 1868, by clearing and freeing it for ever hereafter from the said will and testament so as to enable the petitioner and her present husband, or both of them, to sell, let, mortgage, bequeath or otherwise deal with the farms as she, he, or they might think fit, or for such relief in the premises as to the Court should seem meet.

Notice of the present application had been given to the children still living of the petitioner's different marriages and also to the children of her sister (Mrs. Van Wyk) who also received a pre-legacy of two farms under the will.

The petitioner's daughter Mrs Fryer alone opposed the application. Another daughter, Mrs Louw, did not intimate assent, but the Strauss family and the Van Wyks all submitted to the Court's judgment.

The matter was referred to the Registrar of Deeds, but he declined to sanction the proposed amendment without an order of Court.

Mr. Schreiner, Q.C., in support of the application: I would suggest that, if the applicant be held to be entitled to the property, the Court should authorise the passing by her to her husband of transfer, without change of ownership, free from the conditions of the will.

As to the merits: The point is as to the construction of the will. The applicant's rights accrued on the death of her mother in 1858 and the adiation of her father.

She was a fiduciary legatee, her two children by Fryer being *fidei-commissaries.* They both died in her lifetime and the *fidei-commissum* lapsed. There never vested in them any estate upon which the will could operate. Thus the Van Wyks could never have any right, since the children of the applicant died before their mother, even if the will be construed as contemplating a possible right in them.

Mr. Rose-Innes, Q.C. (for Mrs. Fryer), opposed the application on the ground that the intention of the testator was that the petitioner should only have a life interest in the property.

The Court granted the application.

The Chief Justice said: The question between the parties is whether under the will the applicant takes a fiduciary interest in the farms in question or simply a usufructory interest. In every case the Court must look at the whole of the will in order to arrive at the true intention of the testator. We find that the bequest of the farms is treated as a pre-legacy; in other words, the legatees are treated as heirs. Mr. Innes has admitted that if these words appeared alone in the will there could have been no doubt that the testator's intention was to give a fiduciary rather than a usufructory interest. He relied very much upon the words following, which were to the effect that no portion of the farm should be disposed of by the daughter. The technical term usufructory is not used in the will. From the terms of the will the testator, I think, did not intend any diminution to take place until the death of the applicant. Upon the whole facts, however, we are of opinion that it is a fiduciary interest, and that therefore the petition must be acceded to. The application will be granted, and a new transfer deed is authorised to pass from the applicant to her husband.

Their lordships concurred.

[Applicant's Attorney, S. I. Mostert; Mrs. Fryer's Attorneys, Messrs. Van Zyl & Buissinné.]

REGINA V. ADAMS. { 1894. April 14th.

Theft—Evidence of accomplices—Conviction.

Where A was convicted of theft on the evidence of two accomplices, who were believed by the Magistrate, the Court on appeal refused to quash the conviction.

This was an appeal from a sentence passed by the Assistant Resident Magistrate of Kenhardt upon the appellant, Petrus Lavens Adams, a European road contractor, charged with the crime of theft, in that upon or about 26th February, 1894, and at Laat River in the district of Kenhardt, he did wrongfully and unlawfully steal one pot, one dish, one axe, one spoon, and one basin, the property, or in the lawful possession of one Josiah Hunster, residing at Laat River.

The stolen articles were produced in court, and identified by Miss Hunster as being the property of her father, who is blind.

The chief witnesses for the Crown were a coloured man and boy.; the former had already been convicted for the same theft, and the latter turned Queen's evidence. Both of these witnesses deposed that they and the accused had stolen the articles produced.

The accused was found guilty and sentenced to two months' imprisonment with hard labour.

The Magistrate stated in his reasons that he believed the evidence of the accomplices.

From this sentence the prisoner now appealed.

Mr. Searle, Q.C., was heard in support of the appeal. He contended that to justify the conviction there should have been corroborating evidence in support of that given by the accomplices.

He cited *Regina* v. *De Kock* (1 R., 441) and *Regina* v. *Bitterbosch and others*. (3 H.C.R., 495).

Mr. Giddy for the Crown.

The Court dismissed the appeal.

The Chief Justice said: It is impossible to hold as a matter of law that the Magistrate was wrong in his decision. There is no doubt that the theft was committed on the day in question, and that the prisoner was in a place where he might have committed the theft. It is contended, however, that there is no corroborative evidence of the testimony of the two accomplices as to the prisoner being one of the thieves. In my opinion no such corroborative evidence is legally required, if there is clear proof that the crime with which the prisoner is charged has been committed. The case of *De Kock* is not in point at all. In that case there was no proof whatever that the stock had been stolen; all the owner could say was that the stock was missing. In the present case the articles have been absolutely stolen, and one of the thieves has actually been convicted of the theft. Now the two other persons who were concerned in the theft admitted that they were guilty: one of them was convicted, the other turned Queen's evidence. Both were positive that the prisoner assisted them, and was in fact the prime mover. This evidence taken in connection with the undoubted fact that the crime had been committed was sufficient to justify the conviction of the prisoner. The only question therefore is whether the verdict is not really against the weight of evidence, or even whether the matter is not so doubtful that it was the duty of the Magistrate to give the prisoner the benefit of the doubt. I confess that if the Magistrate had acquitted the prisoner I should have found no fault with his verdict; but on the other hand, he saw the witnesses and the manner in which they gave their evidence. He also had an opportunity of seeing the demeanour of the prisoner himself, which seems to me of great importance in a criminal trial; and he has certified that the two witnesses for the prosecution spoke the truth, and lays great stress upon the manner in which they gave their evidence. It would be going rather far for this Court, even if we found some doubt about it ourselves, to say the Magistrate was not justified in convicting the prisoner. Under these circumstances, I think the appeal must be dismissed.

Mr. Justice Buchanan: Resident Magistrates and especially Assistant Resident Magistrates, ought to be careful in receiving the evidence of accomplices.

Mr. Justice Upington concurred.

[Appellant's Attorneys, Messrs. Tredgold & Co.]

PETITION OF THE FRERE HOSPITAL AT EAST LONDON. { 1894. April 14th.

Mr. Jones applied for an order authorising the cancellation of all title deeds and sub-divisional diagrams of certain lots of land at East London, the property of the said hospital, on which the quitrent has remained unpaid for two years, and in respect of which notice of resumption has been given to the holders.

The Court granted the application.

LEEN V. LEEN.

Mr. Currey, for plaintiff, asked the Court to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights, and for an order giving to applicant the custody of the minor child of the marriage.

It was stated that the defendant was at present resident some distance from Walfish Bay, either in the German territory or under Witbooi.

The Court made the rule absolute, and made the order as prayed.

Re ROSSOUW'S ESTATE. { 1894. April 14th.

Mr. Schreiner, Q.C., asked the Court to make absolute the rule *nisi* restraining the executor testamentary from selling the farms De Plaat and Schalkwyk's Kraal, situated in the division of Sutherland, pending proceedings to be taken by the heirs in the estate of Daniel J. Rossouw, also deceased.

Mr. Innes, Q.C., appeared for the respondent, and suggested that the proposed sale should be allowed to go through; the costs of the application to come out of the proceeds, which might be held over, and then, if the parties could not agree, to state a special case.

The Court, by consent, ordered that the property be sold by the respondent by public auction, after due notice, the proceeds of the sale to be held by him until they can be distributed by consent of the parties, and pending a further order of the Court; meanwhile a special case might be stated, the costs of the application to come out of the proceeds of sale.

IN THE INSOLVENT ESTATE OF JOHN BROOKS.

Mr. Molteno applied for authority to the Master to pay out to the firm of J. O. Smith & Co. certain balance arising from the sale of derelict land registered in the name of the said Brooks, deposited in the Guardians' Fund, in part satisfaction of a mortgage bond proved by them in his insolvent estate, but on which no dividend was awarded.

The Court granted the application.

HUDSON V. BRADSHAW.

Mr. Innes, Q.C., asked the Court to make absolute the rule *nisi* interdicting the respondent from trespassing on property of the applicant at Claremont and from rebuilding thereon certain house, pending an action to decide the ownership of the land in question.

Mr. Molteno appeared for the respondent, and consented to the rule being made absolute on the understanding that the action should be brought as soon as possible.

The Court made the rule absolute, pending the action to decide the ownership of the land in question; the question of costs to stand over.

AURET V. HAARHOFF'S EXECUTOR. { 1894. April 14th.

Mr. Schreiner, Q.C., applied for an order for the removal of the respondent from his office of executor testamentary of the estate of Jacobus C. L. Haarhoff on the ground of his failure to file a full and final account of his administration thereof, as required by order of the Court dated June 4, 1891, to do.

Mr. Innes, Q.C., appeared for the respondent, who is now residing in Johannesburg.

An affidavit by respondent was filed, which stated, *inter alia*, that the service of the application was short. The estate of the deponent's late brother was interested in three different firms, and there never had been a proper settlement between the partners. In consequence of embezzlement committed by the book-keeper of the firm, it was impossible to make up the accounts in the time allowed. He consented to be discharged from his trust, but submitted that his costs should come out of the estate.

The Court made the order, costs in the first instance to be paid out of the estate. If the accounts be not filed and costs not paid within one month, then respondent to pay the costs personally.

Ex parte GLYNN. { 1894. April 14th.

Minors—Transfer of land—Want of consideration.

Where land had been transferred without consideration by the father of certain minors, in his capacity as agent of an executrix, to himself, as father and natural guardian of his minor children, the Court refused to authorise him to re-transfer the property to the estate, leaving the executrix to her remedy by action against the minors.

This was the petition of John Warren Glynn of Cape Town, in his capacity as father and natural guardian of his minor children.

In 1879 the petitioner, acting as agent of the executrix of the late John Warren Glynn, sold to one Fraser certain portion of the Wilderness Estate at Claremont with the buildings thereon, the property of the said estate.

No portion of the purchase price of the said property was ever paid nor was transfer taken, but Fraser, out of funds to the extent of £180 advanced to him by the petitioner individually, erected certain further buildings on the property.

Subsequently Fraser became pecuniarily embarrassed and abandoned all his rights to the said property, at the same time informing the petitioner that he made over his rights in the buildings to him.

The petitioner in his individual capacity was one of the sureties for the due fulfilment of the purchase, but he took no steps of any kind in the matter.

In 1891, however, the petitioner thinking that under the above circumstances he was entitled so to do caused a deed of transfer to be executed, *from himself*, as agent of the executrix, *to himself*, as father and natural guardian of his minor children, of the land on which the buildings erected by Fraser stood, being portion of the property originally sold to him.

No consideration of any kind was given by the petitioner or any other person on behalf of the minors to the estate for the transfer, and a statement in the deed of transfer that the sum of £150 had been paid as the purchase price was incorrect, and arose (as the petitioner alleged) from a misconception of the true facts of the case.

The executrix of the estate through her present agents now demanded that the property should be forthwith re-transferred to the estate and the petitioner having been advised that he was not within his rights in making the transfer, and that the same was illegal, was desirous of complying with the demands of the executrix.

The prayer was for an order authorizing him to re-transfer the property to the estate.

Mr. Searle, Q.C., in support of the application.

The Court made no order.

The Chief Justice said: I think this is a matter in which we ought not to facilitate proceedings at all. If the executrix thinks she has a claim against the minors let her bring an action in the usual way. There will be no order on the present application.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Tredgold & Co.]

IN THE ESTATE OF THE LATE THOMAS SHORT.

Mr. Jones applied for leave to the executors to raise a sum of £1,400 on mortgage of certain landed property of the estate situated in the rear of the Old Somerset Hospital, to enable them to build cottages on the said land for the benefit of the *fidei-commissum* with which the estate is charged.

The Court granted the application.

PETITION OF THE PORT ELIZABETH DIVISIONAL COUNCIL.

Mr. Buchanan asked the Court to make absolute the rule *nisi* for the attachment and sale in execution of certain lots of ground situated in the vicinity of Port Elizabeth, the same having been abandoned and left derelict, and the rates due thereon unpaid.

The Court granted the order.

PETITION OF STANLEY DE LA SNOOKE.

Mr. Searle, Q.C., applied for authority to petitioner to raise a loan on security of certain life policy settled by deed upon his wife and children for the purpose of providing funds for the education of the said children, and further, for leave to the executors of the estate of petitioner's mother to pay over to him the capital sum of certain inheritance devolving upon the said children for similar purposes.

Leave was granted to make further application; meanwhile the whole matter to be referred to the Master.

THE CAPE OF GOOD HOPE BANK. } 1894. April 14th

Mr. Innes, Q.C., asked for the sanction of the Court to certain compromises proposed to be effected by the special liquidators with creditors and others.

The compromises were as follows:

H. O. Beyers, Pretoria, £3,256.—Offers £100, which has been deposited, and all securities in the bank's possession.

S. F. Cohen, Johannesburg, £4,635 14s. 2d.—Offers £100, which has been deposited, and all securities in the bank's possession.

Estate of late James Lang, £400.—The executors offer £100, which has been deposited, for a release to this estate.

Ryno J. Louw, Pretoria, £5,216 16s. 6d.—In consideration of a release being granted to the debtor, the official liquidators have received from Mr. H. J. Louw cession of his one-twelfth interest in 240 deep-level gold claims at Elandsfontein, near Johannesburg, together with an irrevocable power of attorney to sell and pass transfer of same. In addition, the debtor gives up all his right, title, and interest in and to the securities held on account of his indebtedness to the bank.

G. J. M. Melle, Johannesburg, £1,031 13s. 5d. and costs.—Offers £80, which has been deposited, and all securities in the bank's possession.

Frank Menne, Pretoria, £1,216 3s.—An offer of £20, which has been deposited, has been made by the debtor's brother for a release.

A. Tennant, Pretoria, £751 1s. 1d.—Offers £50, of which £30 has been paid, and all securities in the bank's possesson. Release conditional on payment of the £20.

W. Wells, Kimberley, £1,379 17s. 6d.—Offers £100, of which £40 has been paid, and all securities in the bank's possession. Release conditional on payment of the £60.

C. Trevor-Smith, Klerksdorp, £379 19s. 9d.—This debtor, in consideration of a release, has voluntarily given his power of attorney to sell and pass transfer of his farm Graspan, district of Bloemhof, which is bonded to the bank. The Court granted the application.

SUPREME COURT.

[Before Mr. Justice UPINGTON, K.C.M.G.]

Ex parte DE WET.—*Re* ESTATE JONES AND WIFE. 1894. April 17th.

Executor-testamentary—Application for release from office.

Where an estate had been practically wound up, the only duty incumbent on the executors testamentary being to pay over certain rents as they were received to one of the heirs, and one of the executors testamentary (The British Resident in Pretoria) *applied to be relieved of his office on the grounds of his official position, absence from the Colony, and consequent inability to give personal care and attention to the estate, the Court declined to grant the application.*

This was an application on notice to Mr. Alexander Cruickshanks, one of the executors testamentary of the estate of the late Daniel Jones and his predeceased spouse, Catherine Jones, late of Somerset East, that the Court would be prayed to discharge the applicant, Sir Jacobus Albertus de Wet, as executor and guardian under the will of the aforesaid Jones and his predeceased spouse.

The petitioner and Cruickshanks were appointed executors testamentary to the estate of the above-mentioned Jones and his predeceased spouse, and guardians of the minor children.

Catherine Jones died on the 24th May, 1881, and David Jones on the 21st February, 1883.

The testators by their joint will executed on the 3rd April, 1880, bequeathed to their minor daughter, Elizabeth Catherine Jones, by way of special legacy, all the rents and profits arising out of erf No. 4, situate in Charles-street, Somerset East, known as the Masonic Hotel, with the condition that the same should not be sold during the lifetime of the said Elizabeth Catherine Jones, but that after her death the same should revert to and become part of the testators' general estate.

The rest residue and remainder of the estate has been disposed of by the petitioner and his co-executor in terms of the will.

The portions accruing to the major children have been paid out to them, and the portions due to the minors have been paid into the Master's Office on their behalf.

The whole of the estate has been administered and disposed of with the exception of the erf in Somerset East, which still remains registered in the name of the testator, and the rents and profits are duly paid over to Elizabeth Catherine Jones from time to time.

The petitioner alleged that since 1884 he has been Her Majesty's Agent resident in Pretoria, in the South African Republic. That he is consequently unable to give his personal care and attention to collecting the rents and profits and to dealing with the erf, and has to employ an agent on his behalf in the matter. That he was desirous of being relieved in the future from his office as executor and guardian, which his official position and his absence from the Colony prevents him from giving his personal attention to. That the accounts in the estate, with all vouchers relative thereto, have been filed with the Master and have all been duly passed by him. That Elizabeth Catherine Jones has been a major for three years and upwards, and there are now no duties incumbent upon the executors except that of collecting and paying over to her the rent of the erf, and thereafter realising and distributing the proceeds thereof. That if the Court were of opinion that some other persons should be nominated in the place of or in substitution to him (the petitioner) he believed that Mr. S. J. Annear, of Somerset East, was a fit and proper person to be appointed as such substitute, and that he (the petitioner) was prepared to substitute him, or any other person nominated by the Court, by virtue of the powers contained in the will. (Powers of assumption, surrogation, and substitution were given to the executors under the will.)

The prayer was for an order discharge thing petitioner from his office as executor and guardian.

Mr. Molteno was heard in support of the application, and relied on *In re Miller's Estate* (1 Sheil, 34), *In re Jameson's Estate* (2 Sheil, 322), and *Grobbelar's Trustee* v. *Grobbelar's Executors* (Buch. 1879, p. 207).*

The Court held that the present case was distinguishable from those cited in argument, and made no order on the application.

Mr. Justice Upington said: I am afraid Sir Jacobus de Wet cannot be relieved from his office. If a man undertakes the duties of an executor and afterwards leaves the country he must take the consequences. Besides it is an easy matter for the applicant to appoint an agent at Somerset East.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne.]

*See *Ex parte* Kingsmill and Anderson.—*Re* Crockart's Will (4 Sheil, 100). *Rep.*

RUDD V. COLONIAL GOVERNMENT. { 1894. April 17th.

Mr. Rose-Innes, Q.C., moved for the appointment of a commission to take the plaintiff's evidence previous to his departure for England.

The order was granted, the Government consenting.

Re HORAK'S INSOLVENT ESTATE.

Mr. Joubert moved for the appointment of a Commissioner to take evidence relative to the insolvent's dealings with certain assets of his estate previous to his surrender.

The Court granted the application, and appointed the Resident Magistrate of Victoria West commissioner.

GEARD'S EXECUTORS V. WHITE.

Mr. Jones moved for leave to sue by edict in an action about to be instituted against the respondent for the recovery of the amount of a mortgage bond and interest.

The property mortgaged is situated in Uitenhage, which town the defendant left about eight years ago in search of work on the railway at Cradock.

His present whereabouts are unknown.

The Court ordered personal service to be effected, failing which one publication in the "Uitenhage Times," "Cradock Register," and "Gazette." The citation to be returnable on 31st May.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

BROAD V. SCHULTZ AND SMITH.—*Re* ROBERTS'S ESTATE. { 1894. April 24th.

This was an application on notice by the defendants (1) for the postponement of the trial of the above suit until the August term, and (2) for an extension of the operation of the order of the 26th February, 1894, or such other provision as to the Court shall seem meet, relative to the interim cutting or sale by the plaintiff of wood at or on Grassridge, No. 2, until August, and (3) for the costs of this application to be declared costs in the cause. On the 26th February last the plaintiff applied for the removal of the suit for trial to the Uitenhage Circuit Court, to be held on the 6th March. The Court then ordered the case to be heard in the Supreme Court during the May term. An interdict granted on the 12th October last was discharged, the plaintiff undertaking to cut no wood on the farm Balmoral until the 31st May. The present application was made on the grounds that the first-named defendant, Miss Schultz, was at present in England preparing her defence in a suit pending in the High Court of Justice, to set aside the will of the late Mr. Roberts on the grounds of undue influence.

Mr. Sheil for the respondent.

Mr. Searle, Q.C., was heard in support of the application.

The Court ordered the postponement of the trial until the August term, unless notice to the contrary should be given to the plaintiff on or before the 10th May next, the plaintiff's undertaking not to cut wood on Balmoral to last until 31st May.

IN THE INSOLVENT ESTATE OF PETRUS A. STRYDOM.

Mr. Molteno applied for the removal from his office of the trustee of the said insolvent estate of Julius Ascher. by reason of his having left the Colony and his address being unknown, there being assets still unrealised.

Granted.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

ADMISSION.

Ex parte CLOSE. { 1894. May 1st.

Mr. Rose-Innes, Q.C., moved for the admission of Mr. Ralph William Close as an advocate.

Mr. Close took the oath and was duly admitted.

PROVISIONAL CASES.

COLLIE AND DUFFUS V. BUTLER.

Mr. Buchanan applied for the final adjudication of defendant's estate; the provisional order was granted on 9th April last.

Granted.

TWENTYMAN AND OTHERS V. DU PREEZ.

Mr. Searle, Q.C., applied for the final adjudication of defendant's estate; the provisional order was granted on April 18.

Granted.

DAVIS V. BAER.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £200, passed by the defendant to one Howard, and interest in terms of the mortgage at 8 per cent. per annum from April 1, 1891, and also for £1 15s. insurance premium, by virtue of the stipulation in the bond and costs; and that the property be made executable.

Granted.

LINDHORST V. KEYTER.

Mr. Buchanan moved for provisional sentence on a promissory note for £20 15s.

Granted.

DUMINY V. PRINS.

Mr. Buchanan moved for judgment, under rule 329, for £50 for rent due, and £4 1s. 6d., balance of account for cash lent and advanced.

Granted.

GENERAL MOTIONS.

MAKALELA V. MAKALELA.

Mr. Tredgold moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce.

The Court made the rule absolute.

BAYLY V. BAYLY.

Mr. McLachlan moved to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights, and for an order giving the custody of the children to the mother.

The Court made the rule absolute.

SMITH V. SMITH.

Mr. Sheil moved for leave to sue *in forma pauperis* in an action against petitioner's husband for restitution of conjugal rights, failing which for a decree of divorce, by reason of his malicious desertion.

Referred to counsel.

IN THE MATTER OF THE PAARL BANK.

Mr. Schreiner, Q.C., applied for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with shareholders and debtors.

The following is the list of compromises:

Jacobus P. Toerien offers for his liability in regard to the second call of £500 on one Paarl Bank share a cash payment of £75.

Jan Daniel Minnaar offers for his direct liability on a promissory note for £780 0s. 6d. a cash payment of £150.

P. J. Perold offers for his direct and indirect liability, amounting to £866, a cash payment of £50 and to surrender all securities held by the bank.

Isaac J. Coetzee offers for his direct liability to the Paarl Bank of £100, a cash payment of £50 and to surrender all claim to a floating deposit in the Paarl Bank of £25.

Estate of the late Barend J. Blignaut offers for its liability on twelve shares, amounting to £9,000, and other liabilities due to the bank on promissory notes direct amounting to £809 2s. 3d., a cash payment of £40.

The executors testamentary of the estate of the late Jan Hendrik Malan offer for the liability of the said estate on eleven Paarl Bank shares and amounting to £8,270, a cash payment of £1,056 16s. 3d., for which amount it appears the heirs would be responsible, the estate having been finally wound up in March, 1888, as per liquidation and distribution account.

Godliefe W. Malherbe offers for his liability to the Paarl Bank direct and indirect, amounting to £3,420, a cash payment of £75; to surrender floating deposit in Paarl Bank of £5 4s. 3d., and erf in Lady Grey Bridge-street valued for £25 and all right to the Van Riebeek Syndicate.

Jozua F. Malherbe offers for his liability to the Paarl Bank, amounting to £339 8s. 3d., a cash payment of £250, and to surrender two Wine and Brandy Company shares held by the bank.

Isaac Hermanus Lambertus Minnaar offers for his liability to the Paarl Bank, amounting to £495 7s., a cash payment of £125, the bank to hand up his life policy and to retain all other securities.

The Court sanctioned the compromises.

Ex parte FITTIG. *Re* THE INSOLVENT ESTATE OF F. C. LIDDLE.

Mr. Molteno applied for authority to the Master of the Supreme Court to call a special meeting of creditors of the said estate, for the purpose of

electing a new trustee, the trustee originally elected being dead, and a piece of land in the estate still remaining to be dealt with. This application was supported by the verifying affidavit of the petitioner, Mr. Fittig.

The Court granted the authority applied for.

IN THE ESTATE OF THE LATE FAKIER PAWLAY.

Mr. Tredgold applied for leave to the executrix testamentary to raise a sum of money on mortgage of the landed property in the estate for the purpose of satisfying the debts thereof, and for effecting certain necessary repairs to the houses on the land in question. The repairs would cost £30. The petitioner derives from the property the necessary support for herself and children. The Master saw no objection to the application being granted.

Leave was granted.

PETITION OF ANNA M. C. KAIBER.

Mr. Graham moved for leave to sue *in forma pauperis* in an action against petitioner's husband for divorce by reason of his adultery, or otherwise for restitution of conjugal rights, failing which for divorce by reason of his malicious desertion.

Leave was granted.

STRASBURGER V. TREBOR FRERES.

Mr. Maskew applied for leave to the defendants to sign judgment against the plaintiff with costs, by reason of his failure to proceed with his action within the time prescribed by the rules of court. The plaintiff took out summons on 10th November; appearance was entered on 16th November, and on the 22nd April plaintiff was barred.

Mr. Searle appeared for the plaintiff, and agreed to file the declaration in four days.

The Court made an order that plaintiff file his declaration in four days as agreed, and pay the costs of the present application and of the costs of bar.

COLLIER AND HILL V. VERCUIL.

Mr. Sheil applied for the attachment *ad fundandam jurisdictionem* of this Court of the amount of a mortgage bond about to be paid over to respondent's agents, and for leave to applicants to sue by edictal citation in an action against respondent for an account for goods sold and delivered.

The application was granted, the citation to be returnable on the 22nd May; personal service if possible, failing which one insertion in the "Volksstem." The funds about to be paid to defendant's agents to be attached *ad fundandam jurisdictionem*.

Ex parte CAREY. } 1894.
Re CAREY'S WILL. } May 1st.

Minor—Will—Immovable property—Sale.

Where immovable property, which had been bequeathed to a minor, had become dilapidated, and there were no available funds wherewith to repair it, the Court, on being satisfied that it was clearly for the benefit of the minor, authorised the sale of a portion of the property.

A provision in a will that the immovable property shou d remain in the family name as long as possible *held not to amount to a* fidei-commissum.

This was the petition of Mary Ann Carey widow of the late Michael Frederick Carey.

The petitioner is the natural guardian of her minor son Patrick Carey and holds in trust for him certain landed property situate at Woodstock.

The petitioner alleged that the premises upon the property were out of repair and that she had not funds belonging to her ward wherewith to repair them.

That the premises were known as the "Bromwell Hotel," until lately licensed for trade in liquors, but that owing to the dilapidated condition of the premises the renewal of the licence had been withheld.

That to save the licence and restore the buildings Ohlsson's Cape Breweries Co. (Limited) had offered to purchase the hotel and a portion of the ground for £600. (The Divisional Council valuation being £400.)

The petitioner alleged that she had accepted the offer, subject to the approval of the Court, as the price would enable her to benefit her ward by erecting rent-producing buildings upon the remaining extent of the property.

That the rent derived from the portion of the property sought to be sold was swallowed up in repairs during the past year, so that no benefit had accrued to the minor by holding the property.

The extent of ground to be retained for the minor was sufficient for the buildings proposed to be erected.

The will of the late Patrick Carey, the bequeather of the property, contained the following provision:

And I desire that the immovable property in my estate shall be kept in the family name "as long as possible."

This provision or restriction the petitioner urged was now in conflict with the interests of her ward, and she prayed for an order authorising the sale and transfer of the part of the property above mentioned, and also setting aside the restriction contained in the will.

The matter was referred to the Acting Master, and he reported as follows:

The will of the late Patrick Carey contains the following clause:

"I desire that the immovable property in my estate shall be kept in the family name *as long as possible.*"

On inquiry I find that the building known as the Bromwell Hotel is in such a dilapidated condition that the purchasers intend pulling it down and entirely rebuilding it. Under these circumstances, and the reinvestment of the proceeds as proposed, I am of opinion that the sale would be beneficial to the estate. Proof should, however, be produced that the money has been invested as proposed.

Mr. Buchanan was heard in support of the application.

The Court granted the order in terms of the Master's report, and held that the provision in the will that the immovable property should be kept in the family *as long as possible* did not create a *fidei-commissum.*

[Petitioner's Attorney, A. H. McLeod.]

Ex parte HILL. *In re* HILL v. BILBOROUGH. { 1894. May 1st.

Lease—Rent reserved—Option of purchase—Covenants—Breach—Interdict

B *by a deed of lease demised certain premises to* H. *for a term of five years at a reserved rent, payable on 1st January and 1st July in each year.*

It was provided inter alia *by the lease that if any rent reserved or any part thereof should remain unpaid for the space of three months after the time appointed for payment thereof, the lessor might, if so disposed, declare the lease cancelled.*

It was further provided that the lessee should have the right to purchase the premises at any time during the term of the lease for £5,000, *but should a satisfactory offer be made for the premises during the term of the lease by any other person or persons, the lessor should be bound and obliged to give the lessee the refusal of the same for thirty days at the price and upon terms so offered by such other person or persons.*

In March, 1894, *the rent not being three months in arrear,* B. *without giving* H. *the refusal of the property sold it for* £1,400 *and on the 6th April,* 1894, *gave* H *notice that the lease was cancelled, the rent being more than three months in arrear.*

H. *applied for an interdict restraining the transfer of the property. In his petition he alleged that he had spent large sums in effecting improvements, but he did not specifically deny that the rent was in arrear.*

The Court made no order on the application, but granted H. *leave to amend his petition by alleging either that no rent was in arrear, or that his claim for improvements exceeded the amount of the arrear rent, and directed that notice should be given to* B. *and to the purchaser that any dealing with the property would be at their risk.*

This was the petition of Robert Ashmore Hill, of the Waterfall Mill, Aliwal North.

The petition set forth that by the memorandum of agreement dated the 18th day of July, 1892, Bilborough leased to the petitioner the woolwash. mill and machinery known as "Waterfall," situate on the bank of the Kraai River and adjoining the Town Commonage of Aliwal North from the 1st January, 1892, for a term of five years thence next. ensuing at a rental of £200 for the first year, £250 for the second year. £300 for the third and fourth years, and £350 for the fifth and last year, payable on the 1st January and 1st July in each year.

The memorandum of agreement contained *inter alia* the following clauses:

Clause 9: *If any rent hereby reserved or any part thereof shall remain unpaid for the space of three months after the time hereby appointed for payment thereof, or if there shall be any breach of any of the covenants herein contained and on the lessee's part to be performed, then and in such case, or either such case, the lessor may, if so disposed, declare this lease cancelled, and the same shall thereupon be and become null and void* and *of no force and effect whatsoever.*

Clause 10: *That the said lessee shall have the right to purchase the premises hereby demised at any time during the said term for the sum of £5,000 sterling, and should a satisfactory offer be made for the said premises during the said term by any other person or persons, the lessor*

shall be bound and obliged to give the said lessee the refusal of the same for thirty days at the price and upon the terms so offered by such other person or persons, and the said lessee shall have the right to purchase the said premises at the said price, and upon the said terms, at any time within the said period of thirty days, but if the lessee shall not have so purchased the said premises within the said period then and in such case at the expiration thereof the said lessor shall be at liberty to sell the same to such other person or persons (subject however to this lease for the unexpired period thereof), *anything herein contained notwithstanding.*

The petitioner has been since the date of the agreement and still is in possession of the premises.

On 6th April, 1894, the petitioner received a letter from Bilborough's attorneys from which the following is an extract:

We are also instructed to inform you that as your rent is more than three months in arrear, and your covenants under the lease have not been fulfilled, Mr. Bilborough has in terms of clause 9 of the lease cancelled same from this day.

The petitioner alleged that he had recently ascertained that during the month of March last one De Wet made an offer to Bilborough or his agents of £1,400 for the property, which offer was considered satisfactory by Bilborough, and without the knowledge or consent of the petitioner, was accepted by him, and that he (petitioner) verily believed that it was Bilborough's intention to at once pass transfer of the property in favour of De Wet.

That Bilborough although he considered the aforesaid offer a satisfactory one, and had accepted the same, had not at any time, in compliance with clause 10 of the agreement, given the petitioner the refusal of the property at the price, and upon the terms offered by De Wet, and he (the petitioner) had no opportunity afforded him to exercise his right to purchase the premises at the said price and upon the same terms.

The petitioner denied the validity of the notice of cancellation contained in the letter from Bilborough's attorneys, and claimed that he was entitled to purchase the property at the price and upon the same terms as the offer made by De Wet, and which he was willing and prepared to do, and to have a transfer thereof from Bilborough.

That he (petitioner) had expended large sums in improvements upon the property, and that he also had certain claims against Bilborough in respect thereof.

That Bilborough on the 20th April, 1894, issued a summons in the Court of the Resident Magistrate, Aliwal North, to recover from the petitioner the sum of £325, less the sum of £100 allowed by plaintiff (Bilborough) to defendant (Hill) for certain rent alleged to be due from the petitioner to Bilborough.

The petitioner denied that he was indebted to Bilborough in the said sum of £325, or £325 less £100 as alleged, and on the summons coming on for hearing on the 23rd April, 1894, the same was adjourned until 3rd May, 1894, the defendant having, in terms of section 3 of Act 21 of 1876, given notice objecting to the jurisdiction of the Magistrate.

When the lease was entered into Bilborough was and still is domiciled in Johannesburg out of the jurisdiction.

The petitioner alleged that he was not aware of any other property, except "Waterfall," belonging to Bilborough within the Colony.

That he was desirous of taking proceedings against Bilborough to enforce his rights with respect to the property under the lease, or to raise same in reconvention should the proceedings in the Resident's Magistrate's Court be transferred to the Supreme Court, but that before doing so it was necessary that he should obtain an interdict against the sale and transfer of the mill and premises, so as to prevent Bilborough from parting with it before such action could be decided.

The prayer was for an order attaching the mill and premises, and restraining by a temporary interdict the sale and transfer thereof either by Bilborough or by any one else on his behalf, or by the Registrar of Deeds, pending the proceedings to be taken by the petitioner as aforesaid.

Mr. Schreiner, Q.C., was heard in support of the application.

The Court made no order.

The Chief Justice said: As the petition stands it is impossible to give the assistance asked for. If the applicant can state in his petition that there is no rent owing, or that the amount owing to applicant for improvements is in excess of any rent owing by him, then the case may be altered. Applicant may, therefore, apply again after amending his petition. In the meanwhile the better course will be to give notice to De Wet and Bilborough that any dealings with this property will be at their own risk.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

Ex parte MEWES. { 1894. May 1st.

Marriage in community—Insolvency—Surplus.

Where the estate of a man married in community had been sequestrated as insolvent,

and there was a surplus after paying the liabilities of the estate, the Court, on the petition of the insolvent's wife, who alleged that she was without means and ignorant of her husband's whereabouts, granted a rule nisi *calling upon him to show cause why one half of the surplus in the hands of the Master should not be paid to her at once, and the interest on the balance devoted to the support of his minor child.*

Petition of Margaretha Sophia Barbara Mewes (born Moll).

It appeared from the petition that the petitioner was married in community of property to her husband in the year 1864, and that three children were born of the marriage, one a boy, being fifteen years of age.

That in October, 1889, the petitioner's husband left Cape Town and has not been heard of for two and a half years, nor are his whereabouts known to his wife.

That on the 10th February, 1893, his estate was compulsory sequestrated.

That the liabilities of the insolvent together with the costs of administering his estate amounted to £526 19s. 8d. and the assets to £853 1s. 1d., leaving a surplus of £326 1s. 5d., which was duly paid by the trustee into the hands of the Master.

That for the past two and a half years the petitioner has been living with her daughter, her husband not having contributed anything towards her support during this period.

The petitioner alleged that she was fifty years of age, that she had no income, and that her minor child was living with and was supported by her.

The prayer was that the Court might be pleased to grant an order authorising the Master to pay to the petitioner for the support of herself and her minor child the surplus from her husband's insolvent estate.

Mr. Maskew was heard in support of the application.

The Court granted a rule *nisi*, returnable on 22nd May next, calling upon the petitioner's husband to show cause why one-half of the capital should not be paid to the petitioner at once, and the interest on the remaining half devoted towards the maintenance and education of the minor child of the marriage.

Personal service to be effected, failing which one publication in the "Volksstem" (Pretoria).

The rule to be also served on the trustee and to operate as an interdict in the meantime.

[Petitioner's Attorneys, Messrs. Sauer & Standen.]

JEKE V. JUDGE. { 1894. May 1st.

Native marriage—Custom—Cattle.

Where two natives have been lawfully married by native custom the husband, on his wife's death, is not entitled to divert the Cattle, apportioned according to custom to her house, to the house of his second wife although he may have married the latter by Christian rite.

This was an appeal from a judgment of the Assistant Resident Magistrate of Tsolo in an action in which the present respondent (plaintiff in the Court below, and the eldest son of the defendant by his first wife) summoned the appellant (defendant) to show cause why an order should not be made restraining the defendant from diverting from plaintiff's house certain twenty-five cattle and four goats.

The summons alleged that:

1. The plaintiff is the eldest son of the Great House of the defendant, and as such entitled to inherit the property of the said house.

2. The defendant during the month of January last contracted a marriage according to Christian rights.

3. Certain twenty-five cattle and four goats, the property of the aforesaid Great House of defendant, are in his possession, and he threatens to divert the same by giving them to the estate or house of his Christian marriage. Wherefore the plaintiff prays for an order of Court restraining the defendant from so doing, and declaring the said twenty-five cattle and four goats to be the property of the Great House of defendant.

The defendant's attorney objected to the summons, as it was vague and informal and contrary to public policy.

The plaintiff's attorney contended that it was purely a native case, and should be tried according to native customs.

The objection having been overruled, the defendant pleaded the general issue.

The evidence went to show that the defendant and the plaintiff's mother, Masela, lived together as man and wife for years; that several children were born of the union, which was contracted in the Colony proper, and that after her death he married by Christian rite his present wife, Nomenti, to whom he had been married according to Kafir custom during Masela's lifetime.

The position taken up by the defendant at the trial was that Masela had never been his wife, that she was a mere concubine, that her house was not the Great House, and that the cattle referred to in the summons did not belong to Masela's house but to defendant's mother's house.

Mqulukulu, the defendant's headman, gave the following evidence: I am a headman. The defendant has lived in my district eleven years. He brought two wives. He told me they were his wives. He paid hut tax for them. This case came to me. The defendant came to me. He said there were sixty-nine head of cattle belonging to the "Great House," this was last year. A lot of them have died. I settled this case and defendant agreed. I told him not to mix up the property of the two houses, but keep them separate for the benefit of each, and that defendant was to keep possession of them for life, but each house was to use their own.

This decision is in accordance with native custom. It is never allowed to take the property of one house for the benefit of another.

The Acting Resident Magistrate granted the order as prayed, with costs. The following were his reasons:

This Court believes that it was the defendant's intention to give the stock mentioned in the summons to the house of Nomenti, his wife by Christian marriage, whose house is not the Great House.

Defendant tries to show that he was not married to Masela, but this Court is of opinion that he was according to native custom, and that her house is the Great House. According to native custom huts are not built, and hut tax is not paid for concubines, neither is a concubine taken to a man's own kraal and stock apportioned to her. Defendant states, to prove that she was a concubine, that he had paid Moyi (her father) five head of cattle by which he got a right of ownership to Masela's children, but he cannot be correct, as four of her children were girls, and it is not reasonable to suppose that Moyi would part with his right to their dowry (about forty head of cattle) for five head. The Court holds that although defendant has a life interest in the apportioned stock, he must be restrained from giving any of the said stock to, or using any of it for, the benefit of the house of Nomenti.

Order to carry costs.

From this judgment the defendant now appealed.

Mr. Graham in support of the appeal: It is submitted that the Assistant Resident Magistrate was wrong in deciding this case by native law. The alleged marriage of these parties took place in the Colony, and it is a universally accepted principle that the question as to whether a valid marriage was contracted must be decided by the law of the place where it was celebrated.

That being so it is quite clear that the woman Masela was not the defendant's wife—See *Ngqobela* v. *Sihele* 3 Shiel 467—and the defendant having married Nomenti by Christian rite she is now his lawful wife.

That being so, and there being nothing to show that the defendant could in any way be affected by Act 16 of 1860, could the plaintiff's claim be supported at all?

The term "House" can hardly be used seeing that a concubine has no house used in that sense.

It is idle to suggest that this Court under these circumstances would support the plaintiff's contention.

The defendant has a life-interest in the stock and at his death the question of ownership can be raised.

Counsel referred to *Maclean's Kaffir Law* (pp. 116 & 140).

Mr. Searle, Q.C., for the respondent.

The Court dismissed the appeal.

The Chief Justice said: The main question which the Court below had to consider was whether there had been a lawful marriage according to native custom between the defendant and plaintiff's mother. She is dead. The defendant and plaintiff's mother during her lifetime lived together as husband and wife in East Griqualand. It is contended, however, that inasmuch that as they first began to cohabit together in the Colony, and inasmuch as by the law of this colony it would not be a valid marriage, therefore it cannot be treated as a valid marriage in East Griqualand. In my opinion this contention cannot be held good. The headman and the Resident Magistrate came to the conclusion that there had been a valid marriage. The parties lived together as husband and wife, the property was apportioned between the two houses, hut tax was paid in respect of this woman's hut, and in every other respect she was treated as his lawful wife. The judgment in *Ngqobela* v. *Sihele* seems to have been misunderstood in certain quarters, and so misunderstood as to lead to the conclusion that it has not been carefully read. It is distinctly laid down in that case that neither the Courts of the Colony nor those of Tembuland can recognise as valid any marriage celebrated after the date of the Proclamation with a man who had one or more wives living at the time, but that the Courts of the Colony will recognise the validity of a marriage celebrated in

Tembuland according to native law and custom between two unmarried natives. In the present case I think the parties were lawfully married, and that the Magistrate was justified, therefore, in recognising the native custom. According to that custom the father had no right to divert the cattle from his first great house to his second house, although his marriage with his second wife was a Christian marriage. The appeal must therefore be dismissed with costs.

Mr. Justice Buchanan concurred, and remarked that a similar case was tried by him in the Transkei, and that his judgment agreed in every respect with the judgment just delivered by the Chief Justice.

Mr. Justice Upington concurred.

[Appellant's Attorney, C. C. Silberbauer; Respondent's Attorneys, Messrs. Van Zyl & Buissinnè.]

DU PLESSIS v. FERREIRA. { 1894. May 1st.

This was an action for partition of a farm brought by a minor, assisted by his father, against the co-owners, one of whom objected to the partition.

This defendant in his plea admitted that he did object, but said that he was now willing, provided a proper person were appointed by the Court, and he prayed in reconvention that a fit and proper person should be appointed to effect the partition. A deed of submission had been drawn up, but the person appointed by the defendant refused to sign it.

No evidence was given, but Mr. Searle, Q.C., on behalf of the plaintiff, asked for an order in terms of prayer (*a*) of the declaration, which was as follows:

That the defendant Ferreira be ordered by this Hon. Court to join her (plaintiff) in taking the necessary steps for partitioning the said remaining extent in a fair and equitable manner, and to sign all necessary documents for that purpose.

The defendant did not appear.

The Court ordered the partition to take place, and appointed the Resident Magistrate of Humansdorp to effect it. The costs of the present application to be paid by the defendant.

Leave was also given the plaintiff, in case any difficulty should arise, to again apply to the Court.

SUPREME COURT

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

In re STEWART (*De Lunatico Inquirendo*). { 1894. May 2nd.

This was an action to have the defendant, Andrew Stewart, declared of unsound mind, and incapable of managing his own affairs.

The Attorney-General appeared as *curator ad litem*, and asked for the direction of the Court under Act 35 of 1891, section 33 (par. 5), as to the subpœnas, which had not been stamped, it being alleged that Stewart had no means.

The Attorney-General pointed out that in De Wit's case the Master had paid the stamp duty out of funds in his possession belonging to the lunatic, whereas in the present case the alleged lunatic had no funds, although the Master had paid for the stamp on the summons.

The relatives of the defendant took no active part in the present proceedings.

The Court directed that the subpœnas should be admitted free of stamp duty, as the Attorney-General was satisfied that Stewart was without funds.

The following evidence was then given:

Dr. George E. C. Anderson deposed: I am a medical practitioner, practising in Cape Town. I attended Mr. Stewart in 1892. He was then in a semi-comatose condition. He refused to eat or speak and was sometimes violent. After being about three months in this condition he gradually recovered. I attended him again in July or August of last year. He was then morose and refused to answer questions. I again saw him last night. He is now suffering from general paralysis of the insane. He is at times violent. He refuses food, thinking it is poison. Some of his symptoms have, however, improved during the past few weeks. He eats occasionally, and seems slightly stronger. His wife tells me that he gets up occasionally, but he is very weak and not able to move far. In my opinion he is insane and is not capable of looking after his person and property.

By the Court: It is just possible that he might again recover. If he had not recovered before I should have thought it quite impossible. His earlier symptoms were such as are general in paralysis of the insane. He talked of altogether impossible schemes that would realise large fortunes. Ideas of that kind are frequent in cases of general paralysis. Mrs. Stewart's son is in my opinion a proper person to have the custody of his father.

The Attorney-General stated that Mrs. Stewart came to him some time ago, and requested that her husband should be removed to an asylum. At present there was no vacancy in any asylum. He asked the Court, therefore, to appoint Alexander Adam Stewart, son of the lunatic, curator of the property and person of his father. When a vacancy occurred the lunatic could be removed to an asylum.

Andrew Adam Stewart, son of the lunatic, deposed that his father was under his mother's care, and lived in the same house with witness. He had heard Dr. Anderson's evidence, and agreed with it. His father spent most of his time in bed, and never went out of the house. His father was not capable of maintaining a conversation. He could speak plainly enough, but did not talk sense. He was sometimes boisterous, though not exactly violent. He had no property, but was dependent for his support entirely upon witness and his mother. Witness was in business in Cape Town. He would be able to look after his father, and do what was necessary for him.

By the Court: Would you be prepared to take custody of your father's personal property?

Witness: Yes.

The Court declared the defendant of unsound mind, and incapable of looking after his person or property, and appointed his son, Andrew Adam Stewart, curator of his father's person and property.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONIAL CASES.

ARDERNE AND CO. V. STEVENS. { 1894. May 4th.

Mr. Tredgold applied for provisional sentence on a promissory note dated February 15, 1894, for £110 12s. 9d., value received.

Granted.

MUTUAL LIFE ASSURANCE SOCIETY V. SHEPSTONE.

Mr. Watermeyer applied for provisional sentence on a mortgage bond for £800, dated July 1, 1893. The amount had become due by reason of non-payment of interest. Application was made that the property be declared executable.

Granted.

GENERAL MOTIONS.

WATERMEYER AND VAN DER MERWE V. WEGE. { 1894. May 4th.

Election Petition—Fixing day for trial—Security—Act 9 of 1883.

Where in connection with an election petition the security for costs provided for by Act 9 of 1883, section 4, sub-section 4, had been partially by recognizance, and the 21 days allowed the respondent by section 5 of the Act, within which he may object to the recognizance, had not elapsed, the Court refused to fix a day for the hearing of the petition.

This was a motion on notice to the respondent that application would be made to the Court to-day on behalf of the applicants to fix Monday, the 21st of May, for the trial of the election petition in the above matter filed with the Registrar of the Court.

The petition was served on the respondent on the 20th of April last, and at the same time a copy of the schedule annexed to the petition and of the security bond for the costs of the respondent filed with the petition was also served on him.

The applicants' attorney alleged that he was in the office of Mr. Silberbauer, Deputy Sheriff, a few minutes after the service had been made for the purpose of explaining the purport of his remarks to the respondent (made to him rather hurriedly a few minutes before), when, after a conversation of a few minutes' duration, the respondent remarked to deponent that the security offered was quite sufficient, and that he could not take exception to it, or words bearing precisely the same meaning.

That under all the circumstances, as deponent considered that the respondent had no intention to avail himself of his right to call in question the security offered, and being anxious to consult the convenience of the Court, and not to leave the trial of so important a matter postponed until late in the term, he wrote and wired to the applicants as to whether the 21st of this month should be fixed for the trial of the petition, and as soon as possible after the receipt of a wire from them in the affirmative, deponent, as an act of courtesy, left a notice on the 1st inst. at the respondent's office of the applicants' intention to apply on the 4th instant to the Court to fix the 21st instant for the trial.

The respondent's attorney in his answering affidavit alleged *inter alia* that his client was in Calvinia, that since the receipt of the notice of motion he had not had time to communicate with him, and that the respondent had not either approved or disapproved in writing of the security given.

That the deponent had no means of getting timely instructions as to whether or not the respondent had verbally approved of the sufficiency of the security as alleged by applicants' attorney.

That the respondent could yet, before the petition was at issue, object to the security on one or other of the grounds, that one or more of the sureties are dead, or cannot be found. or have not duly acknowledged the recognisance or otherwise.

That the collection of evidence in disproof of the various allegations in the petition would take some time, and that therefore it would be utterly impossible to safely go to trial during this month.

The deponent also alleged that after receipt of the notice of motion he wrote to the applicants' attorneys directing their attention to the Act, and pointing out to them that their application was premature.

Mr. Rose-Innes, Q.C., (with him Mr. Searle, Q.C.), was heard in support of the application.

Mr. Schreiner, Q.C., for the respondent, took the initial objection that as the twenty-one days from the date of the service of notice on the respondent had not expired, the present application) was premature. (*Vide* Act 9 of 1888, section 5.)

The Chief Justice said: It is impossible for the Court to fix a day for the trial of this petition until the petition is at issue. Under section 6 of the Act, the petition is not at issue until the expiration of the time limited for making objections. This time has not yet expired. The respondent is entitled to this time, and until it has expired the Court can make no order. As to costs, if respondent insists upon his costs we must grant them. This application ought not to have been made, applicants knowing that the time had not expired It is said that Mr. Tredgold understood there was a consent to the security, but that kind of loose verbal understanding cannot bind the respodent.

Mr. Schreiner intimated his willingness that the question of costs should stand over.

The Court ordered the costs to be costs in the cause.

[Applicants' Attorneys, Tredgold & Co.; Respondent's Attorney, S. J. Mostert.]

KRIGE V. DE WAAL. } 1894. May 4th.

Election Petition—Fresh charges—Practice.

An election petition should be framed ready for trial within the forty-two days referred to in Act 9 of 1883, section 4, sub-section 2. If after the expiration of that period it is desired to bring forward fresh charges application shou d be made to the Court for leave to amend the petition.

This was a motion on notice that application would be made on behalf of the applicant requiring the respondent to show cause why such convenient day during the present term, as to the Court should seem proper, should not be fixed for the trial of the applicant's petition.

The petition, with schedules of particulars and a security bond, were presented in terms of section 4 of Act 9 of 1883, and the notice in writing of the presentation and of the nature of the security, accompanied by a copy of the petition and schedules, was served upon the respondent on the 11th April, 1894.

No objection was taken to the security provided by the applicant.

A further statement of additional particulars was filed on the 1st May, and a copy thereof was served upon the respondent's attorneys upon the same day.

The applicant was desirous that the Court should appoint a day during the present term for the trial of his petition which is now in issue.

Notice of the present application was given to the respondent's attorneys at nine this morning. The applicant's attorney alleged it could not be given sooner as the twenty-one days referred to in section 5 of the Act only expired on Wednesday last, and yesterday was a public holiday.

Mr. Van Zyl, one of the respondent's attorneys, filed an affidavit in which he alleged *inter alia* that it would be impossible for him to communicate with his client and his local representatives in order to ascertain which date would be suitable for the hearing of the election petition.

That with reference to the further statement of additional particulars filed on the 1st instant he (deponent) wished to point out to the Court that the "Gazette" notice advertising the return of the respondent as member for Stellenbosch was dated 9th March, 1894.

That on Wednesday last, the 2nd instant, the schedule of further particulars filed by the applicant on the day previous was by deponent's firm forwarded to Stellenbosch for instructions thereon

That until deponent was furnished with the answers to the allegations contained therein, it would be impossible for his firm to prepare and file the particulars of the respondent's defence.

The deponent urged that the application was premature and the notice thereof insufficient to enable him to place before the Court the necessary information to enable the Court to fix such a date for the trial as might not prejudice the respondent in his defence.

Mr. Rose-Innes, Q.C., was heard in support of the application.

Mr. Schreiner, Q.C. (with him Mr. Graham), for the respondent, contended that the additional particulars contained in the schedule filed on the 1st inst. should not be admitted, as it had been filed after the forty-two days referred to in section 4, sub-section 2, had expired. All the charges intended to be made should appear in the petition, and none could, at all events, be advanced after the forty-two days had elapsed. The ruling of the Court on the point was desired, so as to settle the practice. As to the English practice, he referred to *Rodgers on Elections* (pp. 324 and 329).

Mr. Rose-Innes, Q.C., relied on the powers given to the Court under sections 16 and 17 of the Act.

The Chief Justice said: The Act does not provide the exact form the petition shall take, but we are satisfied that the petition should be in such a form that the parties can go to trial on it; and it ought to be placed in that form within the forty-two days fixed by law. If at any time after that the petitioner wishes to bring forward fresh charges then he ought to apply to the Court for leave to amend his petition. This motion should be treated as a cross motion on the part of the petitioner for leave to file his fresh particulars; and we are of opinion that this leave should be granted, provided that the respondent has ample time to prepare his case to meet these fresh particulars. The sole object of the Court should be to secure a fair and effectual trial. Such a trial will be secured if ample time is given to the respondent to answer the fresh particulars alleged by the petitioner. Then we think also that sufficient time should be given by the respondent to the petitioner to enable him to answer his counter charges. The Court will fix the 4th June for the trial of this petition on condition that the respondent files his counter charges ten days before the day of trial. Costs to be costs in the cause.

[Petitioner's Attorney, G. Montgomery Walker; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

Re NEETHLING. { 1894. May 4th.

Lunatic—Funds in possession of the Master.

The Court refused to direct the Master to pay out funds in his possession belonging to a person, who was alleged to be insane, for his support and maintenance, until such person had been declared of unsound mind.

Petition of Wessels A. J. Neethling, the father and natural guardian of Ernest Jacob Neethling, who became of age on the 9th September last and who is of unsound mind.

The petitioner's son is entitled to the sum of £25 0s. 10d. (at present in the hands of the Master), his maternal inheritance.

The petitioner alleged that his son, being of unsound mind and unable to support himself, was under his (petitioner's) care, that he had supported him up to the present time, and was still desirous of supporting and taking care of him as he had done hitherto.

That the above-mentioned sum of £25 0s. 10d. was required by the petitioner for the care, keep, and clothing of his son.

That if he (petitioner) took steps to have his son declared insane the whole of the above amount would have to be expended in payment of the costs of such proceedings.

The prayer was that the Master might be directed to pay to the petitioner the above-mentioned sum of £25 0s. 10d.

The Rev. Mr. Roome, minister of the D.R. Church, Villiersdorp, filed an affidavit in which he alleged that the petitioner's son was well looked after, but that the amount standing to his credit in the Master's hands was required for his support. A medical certificate was put in to the effect that the petitioner's son was of unsound mind.

The matter was referred to the Master and he reported as follows:

If Ernest Jacobus Neethling were of sound mind he would be entitled to receive the amount now in my hands, and under the circumstances set forth in the petition and supporting documents I think it may be paid to his father, who would even then hardly be compensated for supporting him since the date of his majority.

Mr. Maskew was heard in support of the application.

Mr. Justice Buchanan: Expense would have been saved if proceedings had been taken under Act 35 of 1891, sections 29—33, sub-section 3.

The Chief Justice said: It is not usual in cases of this kind for the Court to direct the Master to pay out funds in his possession belonging to a person until such person has

THE PETITION OF BRIDGET BRADSHAW.

Mr. Molteno moved for leave to defend *in forma pauperis* an action brought against her by one Benjamin D. Hudson to have it declared that certain cottage at Claremont bought and paid for by petitioner is his property.

The Court granted the order, the rule to be returnable on May 15.

On the return day the rule was made absolute.

THE PETITION OF LOUIS LYONS.

Mr. Molteno moved for leave to sue *in forma pauperis* in an action against the committee of the Cape Town Jewish Public School for the recovery of damages for breach of contract.

The Court granted the order, the rule returnable on May 17.

THE PETITION OF CAROLINA F. HAYWARD.

Mr. Tredgold moved for leave to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for a decree of divorce.

The Court granted the order.

STREAK V. STREAK.

Mr. Buchanan moved to make absolute the rule *nisi* for the dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of conjugal rights, and judgment in respect of the joint estate in terms of the consent filed by respondent.

The Court made the rule absolute in terms of the consent.

IN THE INSOLVENT ESTATE OF HENRY WATKINSON.

Mr. Molteno moved for an order authorising the Master of the Supreme Court to call a special meeting of creditors of the said estate for the election of a new trustee, the trustee originally elected being dead, and considerable assets remaining to be realised.

The Court granted the order.

IN THE INSOLVENT ESTATE OF HENDRIK F. M. STANDER.

Mr. Graham moved for the appointment of a provisional trustee, with power to finally liquidate the said estate, or otherwise for an order authorising the Master of the Supreme Court to call a special meeting of creditors for the election of a new trustee in place of Philip W. Marnitz, deceased, originally elected.

Granted.

THE PETITION OF GEORGE E. KEMPER.

Mr. Searle, Q.C., moved for authority for the petitioner to sell certain piece of land situated in Stockenstrom-street, Colesberg, transferred to him in trust for his children, and to pay the proceeds into the Guardians' Fund, the ground being at present unbuilt on and producing no revenue.

Granted

VERSVELD'S EXECUTOR V. FRIEDMAN. { 1894. May 10th.

Fraudulent alienation—*Prima-facie* evidence —Interdict.

Where there was prima-facie *evidence that an insolvent, before his estate had been sequestrated, fraudulently sold to one of his brothers certain furniture and stock, the Court granted an interdict restraining the insolvent's brother from parting with the articles pending the bringing of an action by the* curator bonis *to have the sale set aside as fraudulent.*

This was the return day of a rule *nisi* granted on the 25th April last, and which operated as an interim interdict, restraining the respondents Nicolaas Friedman and Samuel Friedman from disposing of certain property mentioned in the applicant's affidavit, to wit, 1 wagon and 12 oxen, 36 ostriches, 1 cow, 1 bull, 7 mares and foals, 1 piano, 2 bedsteads and beds, 1 drawing-room table, 1 dozen chairs, 1 dining table, 1 wardrobe, 2 washstands, 2 dressing tables, and glassware, sold to them by their brother Marcus Friedman, pending an action about to be instituted to set aside the said sale as being fraudulent.

It appeared from the petition upon which the rule was granted that Marcus Friedman's liabilities amounted to £1,478 15s. 1d.

That his landed property, valued for Divisional Council purposes at £654, was mortgaged for £840 14s. 0d., and that it was not likely to realise by auction more than between £800 and £900.

Marcus Friedman's creditors were about to arrange with him for an assignment of his estate, when they learnt from him that on the 14th April he had sold to his brother (one of the present respondents) for the sum of £160 the articles and stock enumerated above.

The petitioner alleged that the sale was a fraudulent one, the prices being considerably below the value of the articles sold, and entered

into *with the object of preferring his brother before his other creditors* and evading payment of his debts.

The prayer was that Marcus Friedman's estate might be sequestrated as insolvent.

On the 24th April the provisional order was granted, and on the 10th May following the final order was decreed.

On the return day of the rule Nicolaas Friedman (one of the respondents) filed an affidavit, in which he alleged that he had bought the articles in question from his brother in the ordinary course of business and for cash (as per vouchers attached).

He further alleged that at the time of the purchase he had no idea that his brother had any intention of surrendering his estate as insolvent or that he even was insolvent.

That he believed from his own knowledge of his brother's affairs that he was solvent, and that he believed that to be the case when the purchase of the goods took place.

He finally alleged that no fraud was committed in the transaction, that the whole was an open business transaction, and that having purchased and paid for the goods they were his *bona-fide* property and not restrainable.

The insolvent filed an affidavit in which he corroborated his brother Nicolaas that the sale was a *bona-fide* one for cash, that at the time of the sale he was solvent, that there was no fraud in the transaction, and that he still believed his estate could pay 20s. in the £.

Both the insolvent and Nicolaas denied that their brother Samuel had had anything to do with the transaction.

Mr. Searle, Q.C., in support of the rule: Many of the articles were sold at ridiculously low prices. There is sufficient *prima-facie* evidence of fraud to justify the Court in granting the interdict pending the action. The respondent can be in no way prejudiced.

Mr. Schreiner, Q.C., for the respondents: This is not a case for an interdict. There is no evidence of fraud.

The transaction was *bona fide* and in the ordinary course of business, and took place at a time when the insolvent had no idea that his estate was about to be sequestrated.

If the rule is made absolute then it will be the duty of every trustee who has the slightest suspicion that there has been an undue preference, or a fraudulent alienation of any kind to apply for an interdict.

The Court would not lightly countenance such a practice. The rule should be discharged.

Mr. Searle, Q.C., replied.

The Court made the rule absolute,

The Chief Justice said: I quite agree with Mr. Schreiner that if the affidavits disclosed a case of undue preference the rule should not be made absolute, but there are circumstances in this case which would lead the Court to think that everything is not above board. I do not wish to go further than that. The Court will, therefore, continue the interdict, pending an action to be forthwith instituted, and will authorise the *curator bonis*, at the expense of the persons who have instituted these proceedings, to bring the action forthwith against the respondent, and will reserve to the respondent his right to any damages which he can prove to have sustained by reason of such interdict; and in reconvention he can claim any damage he may have sustained by reason of being restrained from parting with the goods. The costs of this application to be costs in the cause.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorney, G. Montgomery-Walker.]

MEYER V. SCHOEMAN AND OTHERS. } 1894. May 10th.

This was an application on notice to the respondents that they would be required to show cause why they had not complied with the order of Court dated 1st August, 1893, whereby they were ordered to give applicant transfer of Lot C. De Kango, division of Oudtshoorn, and further, why an order should not issue attaching their persons by reason of their refusal and neglect to comply with the said order, and also why they should not pay the costs of this application.

On the 19th December, 1892, the applicant obtained an interdict restraining the respondents from sub-dividing, transferring, or otherwise dealing with a certain portion (Lot C) of the farm De Kango, situate in the district of Oudtshoorn, and forming part of the estate of the late Matthias J. J. le Roux, pending an action to be brought in the February term by the applicant for transfer to him of the same.

Thereafter a certain compromise was effected between the parties, and on the 1st August last this compromise was made a Rule of Court.

Under clause 2 of this compromise it was agreed as follows:

That the respondents sign and execute the necessary documents and take the necessary steps to grant title and conveyance to the said applicant (Meyer) *of the defined share in the said farm De Kango, known as Lot C, and as at present occupied by him.*

The applicant now alleged that the respondents, although requested and called upon to give him transfer of the said Lot C as ordered by the Court, neglected and refused to do so. Certain of the respondents denied that they had neglected and refused to obey the order of Court and they referred to the correspondence which had passed between the respective attorneys, The other respondents alleged that they had no interest in Lot C nor were they interested in the present proceedings, having ceded any rights which they had had to the applicant.

Mr. Molteno was heard in support of the application.

Mr. Searle, Q.C., for the respondents.

The motion was postponed until 1st August. The respondents to pay the costs of the day, but no answering affidavits of the applicant to be allowed in taxation.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorneys, Messrs.. Tredgold, McIntyre & Bisset.]

RUDD V. COLONIAL GOVERNMENT. { 1894. May 10th.

Spray pump—Machinery for agricultural purposes—Act 1 of 1889, Schedule B.

A Vermoral spraying pump is machinery for agricultural purposes, and as such, is duty free under Schedule B of Act 1 of 1889.

This was an action instituted by Mr. Charles Dunell Rudd, of Fernwood, Newlands, against the Treasurer-General of the Colony.

The declaration alleged that in December, 1893, the plaintiff imported a certain machine, known as a Vermorel No. 1 L'Eclair spraying pump, and that on February 27, 1894, he imported another of the said pumps exactly similar to the one just mentioned.

That the said pumps were manufactured for spraying purposes in connection with agriculture, and were imported with the object of being used for agricultural purposes, and for no other purpose.

That the Collector of Customs demanded the payment of Customs duty upon each of the said pumps, but the plaintiff denied his liability to pay such duty, and claimed that the said pumps should by law be admitted duty free.

That thereafter on the 30th December, 1893, and on the 27th February, 1894, the plaintiff paid to the Collector of Customs the sum of 14s. 6d. on the said pumps, being the amount of duty which would have been payable in case the said articles were not entitled to be admitted duty free.

That the said payments were made by the plaintiff under protest, and were received by the said Collector of Customs subject to such protest, and upon the understanding that the said amounts would be refunded in case it were decided by this Honourable Court that the said pumps were not liable to duty, and the said amounts were thereafter duly received by the defendant according to law.

The plaintiff contended that the said pumps were exempt from Customs duty as being machinery for agricultural purposes in terms of schedule B of Act 1 of 1889, and that he was entitled to be repaid the two sums of 10s. 6d. and 4s. paid by him under protest as aforesaid, but the defendant in his capacity as Treasurer refused to repay or sanction the repayment of the said sums.

The plaintiff claimed:

1. A declaration that the said pumps were not liable to Customs duty.

2. Payment of the sum of 14s. 6d. paid by him under protest as aforesaid.

3. Further relief, with costs of suit.

The defendant in his plea admitted the importation and the payment of the Customs duty under protest. He denied that the pumps were manufactured in connection with agriculture, or that they were imported to be used for agricultural purposes and no other.

He denied that the implements constituted machinery for agricultural purposes in terms of schedule B of Act 1 of 1889; he admitted that he refused to repay or sanction the repayment of the duty paid.

He prayed that the plaintiff's claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., and Mr. Watermeyer appeared for the plaintiff, and the Attorney-General and Mr. Giddy for the Government.

The following evidence of plaintiff was taken on commission on April 21:

Charles D. Rudd, of Newlands, deposed that in December, 1893, he imported a spraying pump, and another one in February last. He paid the duty, amounting to 14s. 6d., under protest. Under the denomination of agricultural machinery these pumps were entitled to come in duty free. He imported them for agricultural purposes. The pumps were ordered from his London agents, who got them from Messrs. Clark & Son, whose invoice he received. Larger sizes could be worked by horse-power. The mechanism was more or less simple, and could easily be rectified. The pump held about two or three gallons, perhaps four. The pumps were imported solely for agricul-

tural purposes. His residence at Newlands was a gentleman's residence, but he grew fruit and vegetables there on experimental lines for the public good to see if such culture could be made to pay. He grew tomatoes for export. His primary object was not to make money. He had eight acres of fruit trees and about five acres of other crops. Mr. Labouchere called him an adventurer; he called himself a public benefactor. He was a landed proprietor, and managing director, with Mr. Rhodes, of the Gold-fields of South Africa,

Henry Myers, one of plaintiff's gardeners, deposed as to the importation of the pumps in December and February last. That produced was one of those imported. It holds about four gallons [Witness here explained the working of the pump.] The pump could be used for spraying fruit trees. The pumps had been in use by him since they were imported. The pump could be easily put in repair by a mechanic; but he could not repair it himself.

For the defence, the Attorney-General called

John Daniel Overbeek, Assistant Collector of Customs, who deposed that he had seen the pump in question. Agricultural implements were admitted subject to a 10 per cent. *ad valorem* duty, and agricultural machinery free. The pump with another nozzle could be used for other than agricultural purposes. Articles of this class had been treated as agricultural implements for the last twenty-five or thirty years, and 10 per cent. paid on them.

Cross-examined: The first pump of this class was imported to the Colony about two years ago by a gentleman at Graaff-Reinet, and at that time it was classed as an implement. A wine-pump was admitted free as a machine. This was more complicated. Every small machine was not necessarily machinery. A sewing-machine paid duty. A garden syringe was admitted as an agricultural implement.

Edward Harcombe, mechanical engineer, Cape Town, deposed that he had examined the pump. It was an ordinary pump for forcing water. With another nozzle, it could be used for other than agricultural purposes.

Cross-examined: He should say there was a piston inside the pump. He considered the pump a machine.

By the Court: He would call the pump an implement. He would not call a sewing machine an implement. A watering-pot was an implement, in his opinion.

Mr. Rose-Innes, Q.C., for the plaintiff. There are two questions to be determined in this case. First, are these pumps machinery, and second, are they machinery for agricultural purposes within the meaning of Schedule B of Act 1 of 1889.

Machinery is a generic term covering all kinds of machines. The pumps in question are undoubtedly machines and are sufficiently complex to take them out of the class known as agricultural implements. See definition of machinery given in *De Beers Consolidated Mines* v. *Collector of Customs* (7 Juta, 145).

If a wine pump is a machine then these spraying pumps are machines.

As to the second point, the evidence is clear that they were imported and used for agricultural purposes. See *Collector of Customs* v. *De Beers Consolidated Mines* (9 Juta, 146).

The Attorney-General, for the Government: A small apparatus like these pumps worked on the same principle as ordinary pumps cannot be regarded as machinery. The term machinery conveys the idea of something large and complicated. (See definition of machinery in the "Imperial Dictionary"). But even if the Court were to hold that the pumps are machines they are certainly not machinery for agricultural purposes.

A person like the plaintiff, who grows fruit and vegetables for pleasure or experiment, cannot be held to be an agriculturist. (See definition of agriculture—"Imperial Dictionary").

Judgment was given for the plaintiff.

The Chief Justice said: The question to be determined is whether the spray pump, imported by the plaintiff, is an agricultural implement or whether it is machinery for agricultural purposes in terms of Act No. 1 of 1889. I quite agree that a mere simple instrument for spraying water with a syringe would not necessarily be machinery. I quite agree that there must be some complication in the apparatus for the purpose of making it machinery, and I quite adopt the definition given, that machinery is a complicated apparatus or combination of mechanical powers designed to increase, regulate, or to apply motion or force. From a description which has been given of this spray pump, I have no doubt that it is such a complicated apparatus or combination of mechanical powers designed to increase, regulate, or apply motion or force to the liquid which is to be applied to the plants. By the authority of Government a full description of this particular pump has been published. The nozzle is minutely described, and it seems to be a marvel of ingenuity. [His lordship read a description of the nozzle published by authority

of Government* and continued.] The apparatus from this description is surely complicated. Very simple, no doubt; still a complicated apparatus designed for a certain purpose. It is admitted on behalf of the Government that wine pumps are admitted duty free. Surely, if with their extreme simplicity of construction they are to be admitted free, an instrument of this kind, which is certainly much more complicated, ought to be treated also as being machinery. The next point is whether this pump is machinery used for agricultural purposes. The Court was asked to hold that the term agriculturist only applied to those who worked on a large scale. I do not see how that definition can be adopted. If it were it would mean this, that if one farmer has some thousands of vines, and imports these spray pumps for the purpose of spraying his vines or fruit trees he may do so duty free, but the small farmer with a few hundred vines is not to be treated as an agriculturist, and is to pay duty. Surely that was not the intention of the Legislature. We must look at the object of the exemption. There can be no proper cultivation of land, as far as fruit trees are concerned, except with the use of sprayers. It is argued that because these pumps were imported by a gentleman in the position of Mr. Rudd, who is not making a living out of agriculture, they could not be imported as agricultural machinery. I confess I cannot understand that argument. It is as open to a man in his position to go in for agriculture and to make profit out of the sale of his fruit as for anyone else. Mr. Rudd says in his affidavit that he grows for experiment, and he does this for the good of the whole country. I am of opinion that this spray pump, however small it may be, is a sufficiently complicated apparatus designed for agricultural purposes to bring it within the exemption from duty, and the judgment of the Court must be for the plaintiff.

Mr. Justice Buchanan concurred.

Mr. Justice Upington concurred. He thought there should be a definition of the word "machinery," not only agricultural but mining machinery.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendants' Attorneys, Messrs. J. H. Reid & Nephew.]

* The following is the description of the nozzle, which appeared in the "Agricultural Journal," No. 13, Vol V, 1892, and which was reprinted and published in pamphlet form by the authority of the Department of Lands, Mines and Agriculture, under the title of "The Use of the Spray pump against Insects and mildew on Farm and Garden Crops," and which was referred to by the Chief Justice in his judgment.

On the top of the carrier is secured the nozzle. This appliance the invention of Professor Riley, the U. S. State Entomologist, is really the soul of the apparatus, and it is worth while to examine it more closely. It consists of a small circular brass box, about the size of a thimble, and into this the fluid is forced through the slit at the side, much resembling the mouth of a carpenter's plane. By such mode of entry it is compelled to revolve rapidly round the sides of the box, and as the only exit is the conical pin-hole in the cover it dashes out with great force, and with a distinct spiral direction.

These two motions impressed upon it make the fluid form a sort of revolving cone, whose sides break up into a cloud of misty particles, thoroughly wetting every square inch of surface within its range.

The economy with which this is effected is readily measured by the extreme fineness of the spray produced and the length of time that the underside of a mass of foliage may be treated before the fluid begins to fall to the ground in drops.

* * * * *

REP.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. DAVID GWYI. } 1894. May 11th.

Animal diseases—Lung-sickness—Act 2 of 1881, section 8—Conviction under repealed section—Act 24 of 1886, section 129, sub-section 5—Neglecting and refusing to place infected cattle in quarantine.

Where a native living in the Transkei had been convicted under the 8th section of the repealed Act 2 of 1881 *there being no corresponding section in the repealing Act* 27 *of* 1893,

Held, *that the conviction was wrong.*

The mere refusal of a native to place infected cattle in quarantine when ordered to do so by his Headman does not amount to a contravention of Act 24 *of* 1886, *section* 129, *sub-section 5.*

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate for the district of Willowvale. The appellant was charged:

1. With the crime of contravening section 8 of Act 2 of 1881, in that upon (or about) the 2nd day of January, 1894, and at or near Mangoba's

Location in the said district, the said David Gwyi did wrongfully and unlawfully remove from other parts of the Colony into the district of Willowvale three oxen, at that time having and being infected with the disease known as lung-sickness.

2. That the said David Gwyi did at the time and place aforesaid wrongfully and unlawfully neglect and refuse to place his cattle in quarantine when ordered by his headman, the aforesaid Mangoba, so to do, and did thereby contravene sub-section 5 of section 129 of Act 24 of 1886.

The prisoner, being arraigned, pleaded not guilty on both counts.

The evidence for the prosecution went to show that the accused returned from transport-riding in the Colony on the 2nd January last, and that three of his oxen were suffering from lung-sickness, one having already died at Kei-road.

The headman of the accused (Mangoba) told him that his cattle would have to be quarantined, and gave him a certain peninsula on the Bashee River, which, the headman in his evidence stated, was used as a place of quarantine for other people's cattle, and directed him to place his cattle there until the quarantine was raised.

The accused, according to the headman, became very abusive and insolent, and refused to place his oxen on the peninsula, or to place them in quarantine at all. The accused, moreover, returned some of the oxen, although they were suffering from lung-sickness, to the persons from whom they had been hired, taking up the position that as the oxen were hired he would have to pay for them during the time they were in quarantine. The headman then made an affidavit, on which the accused was arrested.

The case for the defence was that there had been lung-sickness for some eight months in the headman's location previous to the return of the accused from the Colony, and that no cattle had been quarantined, nor was there a place of quarantine in the location. That some of the oxen were hired from one Nazo, whose cattle had lung-sickness, although the accused was not aware of the fact, nor did he discover it until one of Nazo's oxen died. The accused denied that after his return from the Colony he had had the interview referred to by the headman in his evidence, or that he had seen the headman at all.

The accused was found guilty on both counts and sentenced to pay a fine of £5 on each count, or in default of payment, to be imprisoned for three months with hard labour.

From this sentence the present appeal was brought.

Mr. Sheil in support of the appeal: The conviction on the first count of the indictment was clearly wrong, as the accused was convicted under a section of a repealed Act, and there is so corresponding section in the repealing Act 27 of 1893.

The conviction on the second count was also wrong, as there has been no contravention of Act 24 of 1886, section 129, sub-section 5.

If Act 24 of 1886 imposed the duty upon the headman of taking possession of infected cattle and placing them in quarantine, and if the accused had in any way interfered with him in the execution of his duty, then possibly he might have been convicted under this section.

But the prisoner remained perfectly passive, and according to the headman's own evidence, all he did was to disobey the order to put his cattle in quarantine.

It is difficult to see how the Magistrate could have construed the action of the accused as one of resistance, hindering or disturbing any constable, policeman, or officer of any local authority in the execution of his duty in terms of the sub-section.

Mr. Giddy for the Crown: The Magistrate erred, and neither conviction can be supported.

The Court allowed the appeal and quashed the conviction on both counts.

The Chief Justice said: I regret that the conviction in this case cannot be sustained. The prisoner was charged under section 8 of Act 2 of 1881. This Act has been repealed by Act 27 of 1893, and this latter Act has been made applicable to the Transkeian territories by proclamation of the Governor. If the man had been charged under the Act of 1893 for not giving due notice that his cattle were suffering from lung-sickness, he might have been convicted under the 14th section of the Act. Unfortunately the man was charged under the Act of 1881, and it does not appear that exactly similar provisions have been incorporated in the Act of 1893. As to the second charge, there seems to have been no resistance to an officer in the execution of his duty. The prisoner was charged with wrongfully and unlawfully refusing to place his cattle in quarantine as ordered by his headman so to do, but there is nothing to show that the headman had authority to give that order under the Act of 1881, nor is there under the Act of 1893. In any case there was no resistance to any persons in authority, and therefore the appeal must be allowed, and the conviction on both counts quashed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

PIETERSEN V. OCTOBER AND OTHERS. { 1894. May 11th.

Libel — Truth — Justification — Absence of malice—Benefit Society—Expulsion.

P., *a member of a Benefit Society, made certain charges against the secretary which were investigated and found to be false.*

By the rules of the society any member in arrear with his subscription ceases ipso facto *to be a member, although he may be re-admitted to membership on payment of his arrears.*

P. *was in arrear with his subscription, and was expelled from the Society.*

After the investigation as to the charges brought against the secretary, P. *reiterated the charges.*

The Society thereupon inserted a notice in a local paper to the effect that the charges brought by P. *against their secretary were false, malicious and without foundation, and that* P. *had been expelled from the Society.*

In an action in the Magistrate's Court for £20 damages, brought by P. *against the Society for libel in publishing the notice, judgment was given for the defendants on the grounds that they were justified in publishing the notice, and that they had done so without malice.*

On appeal, *the Magistrate's judgment was upheld.*

This was an appeal from a decision of the Assistant Resident Magistrate for Cape Town in an action in which the present appellant (plaintiff in the Court below) sued the present respondents for £20 damages for libel.

The summons alleged that on or about the 18th day of November, 1893, and at Cape Town, the defendants wrongfully and unlawfully, falsely and maliciously, published of and concerning the plaintiff, in a certain newspaper published and printed at Cape Town and called the "Cape Times," the false, scandalous, defamatory, and malicious statement following:

NOTICE.

We the undersigned (meaning thereby the defendants) hereby certify that we have examined into the reports circulated by A. A. Pietersen (meaning thereby the plaintiff) against Mr. Moyle, secretary of the Hervormd Weldadig Society, and have found the same to be false, malicious, and without foundation, and further, that the said A. A. Pietersen has been expelled from the said society.

Whereby the said plaintiff has suffered £20 damages, which the defendants neglect and refuse to pay.

The plaintiff prayed for judgment for £20 with costs.

The defendants admitted the publication of the words as contained in the summons, but pleaded specially that the statements were true, and were published without malice in defence of the officers and members of the society and in the public interest, and that the occasion and circumstances warranted the time and mode of publication.

The Assistant Resident Magistrate gave judgment for defendants with costs.

The Magistrate, after referring to the summons and plea, gave the following reasons for his judgment, from which the more material, facts appear:

The question for the Court to decide is, have the defendants proved their plea of justification and if not, what damage, if any, would the plaintiff be entitled to? After carefully perusing the evidence, I have come to the conclusion:

1. That the plaintiff having questioned the correctness of the society's books, and having imputed fraud and cheating to the secretary of the society, two auditors were appointed (one of whom was nominated by the plaintiff) by meeting of the society convened on the 18th September, 1893.

2. That the auditors reported at a meeting held on the 2nd October, 1893, that they had discovered a deficiency of 3s. 6d., due to a clerical error, not being the secretary's fault, this report was adopted by the meeting.

3. That thereafter and within the hearing of Carel October (the president of the lodge) the plaintiff again accused the secretary of having squandered £15 of the lodge money, and again within the hearing of Marthinus Fisher plaintiff made use of the following words: "I don't want to be in the lodge any longer, as they are all thieves."

4. That at a meeting held on the 30th October, 1893, plaintiff was expelled as a member of the said lodge by resolution of the High Committee.

Having arrived at these conclusions, I consider the defendants were justified in publishing the notice complained of in defence of the reports circulated by plaintiff against the secretary of the Hervormd Weldadig Society, and they did so without malice. Judgment will therefore be for defendants, with costs of suit.

From this judgment the plaintiff now appealed.

Mr. Graham was heard in support of the appeal.

Mr. Searle, Q.C., for the respondents.

The Court dismissed the appeal.

The Chief Justice said: The case for the appellant has been very ably argued, but upon the whole the Court is of opinion that the verdict of the Magistrate was justified. It appears to me that the plaintiff has himself to blame for the publication which he now complains of. He made a certain complaint against the secretary of the society. That complaint was investigated by a committee duly appointed, and that committee reported that although there had been some discrepancies in the accounts of the secretary, yet those discrepancies were caused by some mistake in the rough draft. After this report the plaintiff continued to make, as I understand it, the same charges. It is argued now that it was the duty of the committee, when the plaintiff made a fresh charge, to make a fresh investigation, but all that could be insisted upon fairly was that specific charges should be met. The plaintiff made vague charges; the secretary was accused of squandering £15 of the club money, and to a witness plaintiff said they were "all thieves." These charges naturally induced the authorities of this society to stand on the defensive, and the society adopted the natural course to make it known to the public that the charges made against their secretary had been investigated, and found to be false, and moreover, that the plaintiff had been expelled from the society. I do not think we can weigh these words so very finely in a case like this, where the society itself was on the defensive. Their secretary was accused of squandering the funds, and naturally, I think, in answering these charges they would not weigh their words quite so carefully as they otherwise might have done. It appears to me that this publication was the truth. The committee had investigated the charges and they had come to the conclusion that these charges were false; and seeing that the same charges had been reiterated, they further came to the conclusion that they were malicious charges. It does not appear that any fresh charges had been specified; and the committee, therefore, were justified in considering their original investigation sufficient for the purpose of disproving the charges. The second statement in the alleged libel seems to me a more serious one, viz., that the plaintiff was expelled from the society. I quite agree with Mr. Graham that if the expulsion was illegal the defendants would not have been justified in saying what they did; but from the evidence it appears that the expulsion was perfectly legal. The plaintiff was in default; had not paid his arrears, and *ipso facto* had ceased to be a member of the society. He is told at a meeting to leave, and is made to leave that meeting. After that it was quite competent for the society to admit him again on payment of his arrears, but they refused to exercise this power, and under their 16th rule it is quite within their powers to refuse. Therefore he may be considered to have been expelled from the society. This case is a jury question, and the Court is not prepared to set aside the finding of the Magistrate exercising the function of a jury. On these grounds, we are of opinion that the appeal should be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, J. Hamilton Walker; Respondents' Attorney, P. M. Brink.]

Ex parte HORNE.—*Re* THE MINOR RADEMEYER. } 1894. May 11th.

Minor—Capital.

Where it was clearly for the benefit of a minor to enable her to go to Europe to consult specialists as to her state of health, the Court authorised her tutor to sell £500 worth of Cape Government Stock, part of the minor's capital, to defray her expenses.

This was an application by the minor's tutor for authority to sell £1,000 worth of Cape Government Stock to enable the minor to proceed to Europe to consult specialists as to her state of health.

The petition set forth that the minor was possessed of a sum of £3,000 bequeated to her by her parents, and that the money was invested partly in bonds at 6 per cent. and partly in Cape Government Stock at 3½ per cent.

That the health of the minor, who was twenty years of age, was such that it was necessary that she should proceed to England to obtain special medical advice, and that £1,000 would be required for that purpose.

That it was also proposed that the minor should be accompanied by her sister (the applicant's wife), as it was necessary that the minor should have some one to take care of her.

The prayer was for an order authorising the petitioner to sell £1,000 of Cape Government Stock to defray the expenses of the minor and her sister to and during their stay in England.

The petition was supported by the affidavits of the minor herself and of her local medical attendant,

The matter was referred to the Master and he reported as follows:

Mr. C. A. Horne, the petitioner, is the duly confirmed tutor testamentary of the minor, the co-tutor nominated in the will of her father not having taken up his appointment. There is no special provision in the will with regard to the inheritance of the minor.

It is of course for the Court to judge whether the evidence submitted establishes the necessity for the proposed expenditure.

The amount asked for seems unnecessarily large, about £130 would cover the costs of return tickets to England for the minor and her companion, and I think that, if the Court entertains the application, the sum authorised to be raised should, for the present, not exceed £500. The tutor should, of course, render a proper account in the usual manner of any moneys which the Court may authorise him to expend.

Mr. Searle, Q.C., was heard in support of the application.

The Chief Justice said: Under the special circumstances of this case the Court will make an order in terms of the Master's report. The petitioner will be authorised to sell £500 worth of Cape Stock for the purposes of paying the expenses of the minor during her stay in England.

Mr. Justice Buchanan: I think the sum given is ample, and unless something very much stronger than anything that appears in the affidavits is put before the Court, I should not feel inclined to advance another penny.

Mr. Justice Upington: Were it not for the Master's report I should not have been inclined to grant so much money.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON, K.C.M.G.]

WOODFORD v. WOODFORD. } 1894. May 15th.

Minor—Father's right to custody—Interdict.

The Court, on being satisfied that a father owing to his intemperate habits and violence was not a fit and proper person to have the custody of his minor children, restrained him by interdict from removing them from the South African College School and taking them with him to America.

This was the return day of a rule *nisi*, granted on the 9th inst., and which operated as an *interim* interdict, calling upon the respondent to show cause, if any, why he should not be ordered to deliver up the children, named Washington W. W. Woodford and Lincoln de Wet Joubert Woodford, to Professor Lewis, or to some other person to be named by their mother, on the grounds that their lives would be in danger if they were left in the respondent's custody.

The petition of Mrs. Woodford's attorney upon which the rule *nisi* was granted alleged:

That she was the wife of the respondent, lately of Johannesburg, but at present in Cape Town. That there were three children of the marriage, two boys and a girl.

That Mrs. Woodford had proceeded to London to give evidence in a case in which she was interested. That she had taken the girl with her, and her boys were prior to her leaving placed at the South African College School, boarding with Professor and Mrs. Lewis at the South African College House.

That the respondent had not provided his wife with any funds to pay for her passage or for her children's schooling.

That she had had to provide these funds herself, and that previous to her departure she had settled the boys' account for board and lodging and schooling up to the 22nd June, 1894, by which date she hoped to be back in the Colony.

That the respondent had been a mining inspector in the South African Republic, drawing a salary of £100 a month since the beginning of this year. That he had also during the past twelve months received about £3,000 out of the proceeds of certain shares really belonging to his wife but sold by him. That nearly all this money and the amount of the salary received had been wasted by him instead of being applied to the payment of debts and the support of his children.

That the respondent was a man of the most intemperate habits, being at times owing to his intemperance of unsound mind, violent and dangerous. That on two occasions during the past twelve months he had savagely assaulted his wife and would have killed her but for the interference of neighbours.

That his wife had several times to place herself under police protection, and on one occasion her children had to be hurriedly removed from the room where they were sleeping, as it was feared their father would injure them.

That the respondent had recently arrived in Cape Town.

That he was now staying at Woodstock, and stated that he intended if possible to leave the Colony for America by an early steamer.

That he had removed his sons from the South African College alleging that he intended to take them with him.

That fears were entertained that the respondent might, owing to his intemperate habits, injure his sons, or leave them without means of support, and that he was not a fit and proper person to have the custody of his sons.

That Professor and Mrs. Lewis were quite prepared to keep the boys at the South African College House and School until the return of their mother from England.

The petitioner alleged that he was desirous of obtaining a peremptory order for the restoration of the children to Professor and Mrs. Lewis pending the return of their mother as he felt sure that if a rule *nisi* were granted the respondent would remove his children before the return day of the rule, and that he had threatened if any steps were taken to leave by the East Coast to Beira.

The prayer was for an order giving the respondent's wife or her duly authorised agent the immediate custody of her sons and ordering the respondent to deliver the children to her or her duly authorised agents, and that the order might be executed and served upon the respondent forthwith through the High Sheriff, or his lawful deputy, or by the police.

Affidavits from residents in the S.A. Republic were read corroborating the allegations of intemperance and violence appearing in the petition.

Mr. Rose-Innes, Q.C., moved that the rule be made absolute.

There was no appearance for the respondent.

The Court made the rule absolute with costs, leave being reserved to the respondent to apply, upon notice, for discharge of the rule.*

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

VAN WYK v. SAUER AND ORSMOND. { 1894. May 15th.

Auctioneer—Scope of authority—Conditions of sale.

S. & O. *were instructed by* V. *to sell certain erven for him.*

S. & O., *employed as auctioneer one of their clerks,* S., *who managed their business in the absence of the partners.*

The erven were sold subject to conditions of sale, Clause 11 *of which provided that* purchasers should pay transfer duty. Government duty, auctioneer's commission, conditions of sale, *pro rata* share of advertisement, costs of survey and diagram, and transfer expenses.

Before the conditions of sale were signed S. *was asked what the expenses under* Clause 11 *would amount to, and without consulting* S. *and* O., *and without really knowing, said* not less than £5, but not more than £6.

W. *bought an erf of the sale and signed the conditions.*

The expenses under Clause 11 *of the conditions of sale amounted to* £9 3s. 5d.

In an action brought by S and O. *in the Magistrate's Court to recover the* £9 3s. 5d. *from* W. *the latter tendered* £6 *and pleaded that it was agreed between the plaintiffs' qualified agent,* S., *and himself at the sale that the expenses under* Clause 11 *of the conditions would not exceed* £6.

Judgment was given for the plaintiffs for the amount claimed with costs, the Magistrate holding that S. *had not acted within the scope of his authority in stating that the expenses would not exceed* £6, *and that his statement to that effect was not binding on the plaintiffs.*

Held on appeal *from the Magistrate's decision, that* S. *did not enter into a contract on behalf of* S. and O. *at the sale that the expenses would not exceed* £6.

This was an appeal from a decision of the Resident Magistrate of Barkly East in an action in which the present respondents (plaintiffs in the Court below) sued the appellant for the sum of £9 3s. 5d., being, as the summons alleged, the amount of commission, fees, charges, and disbursements specified in an account annexed, and due by the defendant to the plaintiffs in respect of the sale to and purchase by the defendant, at public auction on the 16th day of September, 1891, of certain erf or lot of ground, No. 4, Block E, situate in the township of Rhodes, district of Barkly East, and in respect of the transfer and conveyance of the said erf to the defendant according to the laws and

---

* In *Watson's Case* (not reported) heard in the Supreme Court on the 14th June, 1890, the co-guardian of a minor girl, whose father was dead, was appointed sole guardian, her mother being a confirmed drunkard.

See also *Regina* v. *Gyngall* (69 Law Times, N.S., 481). *Re Mc Grath* (1 Ch) 1893), 143).

As to the right to the custody of illegitimate children by English Law. See *Barnardo* v. *McHugh* (App. Cas. (1891), 388).

REP.

usages of this colony, which said commission, fees, charges, and disbursements the defendant undertook and agreed to pay the plaintiffs in terms of the conditions of sale of the said erf dated the 16th day of September, 1891, and signed by the defendant (a copy of the conditions of sale was annexed), the said plaintiffs being ready and willing, and hereby offering, in case of payment of the said amount and compliance with the said conditions of sale, to deliver to the defendant the deed of transfer of the said erf, passed to and registered in the name of the said defendant. The defendant pleaded as follows:

1. That it was agreed between plaintiff or his qualified agent and defendant, on the 16th September, 1891, that defendant would be called upon to pay the expenses of transfer and other charges as per condition No. 11 of the conditions of sale, but that the amount payable would not exceed £6.

2. A tender of £6 previous to the issue of summons.

3. Tenders £6 into court.

Issue was joined on the first plea, the plaintiff admitting the tender previous to issue of summons and refusing to accept the tender now made.

The material clauses of the conditions of sale were as follows:

6. All purchase amounts must be paid to Messrs. Sauer & Orsmond, Barkly East, the attorneys for the seller, by whom all transfers in connection with the sale must be passed.

11. Purchaser to pay transfer duty (3 per cent.), Government duty, and auctioneer's commission, conditions of sale, *pro rata* share of advertisement, costs of survey and diagram, and transfer expenses.

The case for the defendant was that on the day of the sale Mr. Shaw, the auctioneer, and a clerk in the employment of Messrs. Sauer & Orsmond, was asked what the expenses referred to in clause 11 of the conditions of sale would amount to, and that he said not more than £6.

The following was the accounts annexed to he summons:

Barkly East,
16th March, 1894.

R. P. van Wyk, Esq., Dr. to Sauer and Orsmond.

To auction duty on erf No. 4, E., Rhodes, and Government duty...		6	11
Original conditions of sale	1	1	0
Notarial duplicate copies to be attached to transfer	1	1	0
Drawing declaration seller and purchaser and power to transfer	1	1	0
Paid survey and diagram	1	10	0
Paid stamp on diagram		10	0
Paid deduction of diagram		7	6
Paid share of advertisement ...		11	6
Paid costs transfer	2	14	6
	£9	3	5

The following evidence was given.

Samuel Edward Shaw, sworn, states: I am an auctioneer and am clerk in the employ of Messrs. Sauer & Orsmond at Barkly East. On the 16th September, 1891, I held a sale of erven at Rhodes. The conditions of sale were read out in English and Dutch. They were read out in English by me, and in Dutch by Mr. C. J. F. Visser. He was the roll clerk. I hand in notarial copy of conditions. I am prepared to produce the original. I put in original conditions of sale marked B. Defendant bought an erf on that day in terms of the conditions of sale. He signed the conditions.

By Mr. Cotterell (defendant's attorney): After I read the conditions of sale, as a rule it is my usual practice to ask intending purchasers whether they have any questions to ask, that is, whether they want any further information. Some questions were asked of me.

Mr. Cotterell proposed asking witness whether any questions were asked as to what the expenses mentioned in clause 11 would amount to.

Mr. Orsmond (plaintiff's attorney) objects to the questions, or leading evidence contradicting a written document, or introducing matters not mentioned in the conditions of sale, the contract having been reduced to writing.

Decision on the question to stand over.

Witness proceeds: I do not know the parties who asked. I was asked what the expenses in clause 11 would amount to, that was before the sale was perfected. To the best of my recollection I said *not less than £5 or about £6. I said I thought the expenses would not exceed* £6. That was answered publicly. There was a meeting previous to the sale on the same day of the Committee of the Township of Rhodes, but I was not a member of that Committee. The Committee met just before the sale and they called me in. They did not ask me what the expenses of transfer would be. To the best of my recollection they discussed with me whether Mr. Vorster would charge interest on the purchase amount. I was auctioneer and am clerk at Messrs. Sauer & Orsmond. Mr. Arnold Orsmond is the manager of the business. I manage the business when he is away. I cannot contract any responsibilites for the firm. When the sale of the erven took place this was my position with Sauer & Orsmond. Mr. Arnold Orsmond arrived in March, 1891, and he became

manager. I never had a general power of attorney from Sauer and Orsmond. I have an ordinary power to draw cheques for the firm and I make use of it.

There was no notification that I am aware of that there had been a change in the management. I was only manager for Sauer and Orsmond at first. After Mr. Orsmond's arrival I had instructions not to do anything without his approval. So far as I am aware the public considered that I was in the same position as I held before. In my correspondence I sign *q.q.* Sauer & Orsmond. I have not had anything to do with the framing or rendering of the accounts in the matter.

By Mr. Orsmond: I had not consulted Messrs. Sauer & Orsmond when I stated the charges would not exceed £6. I could not state definitely what the charges would be because I did not know what the Cape Town attorneys' charges would be in connection with such transfer, and I did not know what the advertisement charges would be. The written contract of sale was entered into after I made the statement that I thought the expenses would not exceed £6. The defendant did not ask that the exact amount of expenses should be filled in or that £6 should be filled in as expenses under clause 11.

By the Court: Messrs. Sauer & Orsmond drew the commission.

Mr. Orsmond was not at the sale on the 16th Sept. Everything I did was on their behalf. Mr. J. A. Vorster was the proprietor of the farm, and the firm was acting for him. I told the public the cost would not be less than £5 but not more than £6, and that the reason that I could not fix the exact amount was because I did not at the time know what the Cape Town attorneys' charges would be, nor did I know what the advertisement charges would come to.

The witness for the defence corroborated Mr. Shaw's evidence as to his stating that the expenses would not be less than £5 nor more than £6.

There was no evidence before the Court as to whether Messrs. Sauer & Orsmond's charges were the ordinary charges made for such work, nor did it appear how many of the 274 erven offered for sale had been sold.

The Magistrate held that the auctioneer had not acted within the scope of his authority in stating that the expenses would only amount to £6, that his statement was not binding on the plaintiffs, and gave judgment in their favour for the amount claimed with costs.

The defendant now appealed.

Mr. Schreiner, Q.C., in support of the appeal: The Magistrate erred. Shaw was the plaintiff's agent, and they are bound by his contract that the expenses would not exceed £6. The present is a test case, but the principle involved is important. If the decision goes against the appellant there is nothing to prevent an auctioneer from making the most unwarrantable statements at sales, leaving it to his principals afterwards to repudiate them.

Mr. Rose-Innes, Q.C., for the respondents: The conditions of sale were not signed by the plaintiffs. The contract was between the seller and the purchaser.

Shaw did not intend to bind the plaintiffs when he stated that the expenses would only amount to £6. As a matter of fact, he could not tell what the expenses would amount to. The doctrine of estoppel does not apply in our law, a contract or at least a pact must be proved in each case.

There is nothing on the record to show that the defendant knew that Shaw had been the plaintiffs' manager and agent.

Mr. Schreiner, Q.C., in reply: It is difficult to imagine a more definite agreement than that entered into by Shaw on behalf of Sauer & Orsmond.

Declarations made by auctioneers are binding on their principals. See *Story on Agency*, Section 107 and *Evans*, p. 144.

The Court dismissed the appeal.

Mr. Justice Buchanan said: In this case the appellant bought at public auction a certain erf of ground. The conditions of sale provided that all purchase amounts should be paid to Messrs. Sauer & Orsmond, the attorneys for the seller, by whom all transfers in connection with the sale should be passed, the purchasers to pay transfer duty, costs of transfer, a *pro rata* share of advertisement charges and costs of survey. At the sale Mr. Shaw acted as auctioneer, and I quite agree with Mr. Schreiner's argument that any contract entered into by Mr. Shaw at that auction would have bound the auctioneers. 'He was a clerk of the auctioneers', and he was held out to the public as their manager, and signed cheques on behalf of the firm and represented them as themselves. The question is, was any contract made by Shaw on behalf of Messrs. Sauer & Orsmond with the appellant to the effect that the costs referred to in the conditions of sale would not exceed £6 on each lot. After carefully hearing the evidence and listening to the argument we come to the conclusion that no such contract was entered into. The onus is on the appellant to show that there was such a contract. If there had been any evidence to assist us to the conclusion that these charges are unreasonable we might perhaps reduce the amount of the judgment; but

the sole issue before the Court below was, was there a contract that the expenses would not exceed £6 or was the appellant liable for the amount of expenses. I may state that my own individual opinion is that, where, as in this case, there was simply a printed copy provided for each of the transfers passed, the charges of £1 1s. for conditions of sale, £1 1s. for notarial copy, and £1 1s. for drawing declaration of seller and, purchaser and power to transfer, are very high indeed. A notarial copy is not required by the Registrar of Deeds. Although it is stated that this comes before the Court as a test case, I do not wish it to be considered binding as to other similar cases in which evidence may be given as to the reasonableness of the charges made. I think Mr. Shaw, in representing to the purchasers that the charges would not be more than £5 or £6, simply meant "As far as I can tell you the charges will be that amount." It is clear that Mr. Shaw did not at the time know what the costs in Cape Town would amount to, nor what the advertisement charges would be; and of course he could not possibly tell what the auctioneer's commission would be. Under these circumstances the appeal must be dismissed with costs.

Mr. Justice Upington: I concur. I also think these charges very high indeed, and if there had been any evidence taken to lead us to a conclusion upon the subject I should have been glad to have reduced this amount.

Appellant's Attorneys, Messrs. Scanlen & Syfret; Respondents', Attorneys, Messrs. Sauer & Standen.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr Justice UPINGTON, K.C.M.G.]

THE ACTING CHIEF JUSTICE. } 1894. May 17th.

The Registrar read the formal proclamation of His Excellency the Administrator (General Sir W. G. Cameron) appointing Mr. Justice Buchanan Acting Chief Justice of the Colony during the absence on leave of Sir J. H. de Villiers, K.C.M.G.

PROVISIONAL CASES.

BOARD OF EXECUTORS V. BURGER.

Mr. Graham applied for provisional sentence for £1,700 due on a mortgage bond passed by defendant to plaintiff, due by reason of non-payment of interest and for £250 10s. 6d., being interest on that bond, and also on a bond of £3,000 passed by the defendant in favour of plaintiffs.

Provisional sentence was granted, and the property declared executable.

GRAHAM'S EXECUTORS V. SUTHERLAND.

Mr. Watermeyer applied for provisional sentence for £85 due on mortgage bond, with interest at 7 per cent. from January 1, 1893, and that the property be declared executable.

Granted.

WOLFAARD V. KLOPPER, SEN.

Mr. Webber applied that the provisional order of compulsory sequestration granted by the Chief Justice on April 6 last be discharged.

The Court ordered the discharge.

WOLFAARD V. KLOPPER.

Mr. Webber moved that the provisional order of compulsory sequestration granted by the Chief Justice on April 6 last be discharged.

The Court ordered the discharge.

SOEKER V. ROLFE.

Mr. Graham applied for decree of civil imprisonment on an unsatisfied judgment of £35, with £13 8s. 9d. costs.

The Court granted the decree.

BRISCOE V. ROLFE.

Mr. Graham applied for decree of civil imprisonment on an unsatisfied judgment of £45 13s., with £12 2s. 1d. costs,

The Court granted the decree.

CLEMENTS V. LOTTER.

Mr. Buchanan applied fer judgment under rule 329 for the sum of £10 19s., less £10 paid on account.

Granted.

REHABILITATION.

On motion from the Bar, the following rehabilitations were granted: William Thomas Bruton, Simon Schwalbe, and Hendrik Februarie.

GENERAL MOTIONS.

IN THE MATTER OF THE MINORS COMBRINCK.

Mr. Maskew moved for authority to the tutor testamentary to sell certain house in Loop-street,

Cape Town, in which the minors own shares, the condition of the premises being such that the proposed sale will be for the benefit of the proprietors.

The Court granted the order in terms of the Master's report.

Ex parte KYD. } 1894. May 17th.

Articled clerk—Articles of clerkship— Non-registration—Rule of Court 212.

Where an articled clerk had served for over four years but his articles of clerkship for the first twenty-two months of this period had not, through an oversight, been registered in terms of Rule of Court 212, *the Court refused to admit him as an attorney until he had completed a full period of three years' service from the date of the registration of his articles.*

In re Brown (Buch. 1879, p. 73) *followed.*

This was the petition of Alfred Edward Kyd for admission as an attorney and notary.

The petitioner was articled to William Anderson, of Humansdorp, an attorney of the Supreme Court, on the 20th May, 1890.

Anderson neglected to register the articles, a fact which Kyd only discovered on 10th March, 1892, after having served Anderson for twenty-two months.

Kyd then called upon Anderson for a full explanation, which the latter failed to give.

On 22nd March, 1892, Kyd entered into articles of clerkship with Mr. Attorney Trollip, of Cape Town, whom he served until the 1st April, 1893, on which date the articles were transferred to Mr. Attorney Hutton, whom the petitioner was still serving.

The petitioner alleged that he had obtained his certificate for proficiency in law and jurisprudence, that he was 27 years of age, was entirely dependent on his father for his livelihood and could not afford to serve the remaining year of his articles as by law required, having already served over four years.

The prayer was that the Court might be pleased to appoint examiners to examine the petitioner in the professions of attorney and notary, and if found efficient, that he might be duly admitted to practise in the said professions.

Anderson filed affidavits in which he corroborated the petitioner's statements as to his having served him for twenty-two months, and alleged that owing to an oversight the articles of clerkshsp had not been registered in terms of Rule of Court 212.

The Rev. Mr. Groenewald, of Humansdorp, who witnessed the signatures to the articles of clerkship, deposed to that fact.

Mr. Rose-Innes, Q.C., was heard in support of the application.

Mr. Searle, Q.C., for the Incorporated Law Society.

The Acting Chief Justice said. The terms of the rule of Court are very strict as to the articles being duly enrolled. I do not see that the Court has power to relax the rule in the present case. At far as regards the admission as an attorney, the application must be refused. The application for admission as a notary public will be granted.

Mr. Justice Upington concurred.

[Applicant's Attorney, Gus. Trollip.]

REGINA V. SALMON KLAAS. } 1894. May 17th.

Theft—Conviction sustained on appeal.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Calvinia.

The accused was charged under the provisions of Act 35 of 1893 with the crime of theft of produce, in that upon (or about) the 10th day of April, 1894, and at Bosche Puts, in the district of Calvinia, the said Salmon Klaas did wrongfully and unlawfully steal twelve sheep and goat skins, and one muid sack of wool, the property and in lawful possession of one Hendrik Kafir, a shepherd residing at Bosche Puts.

The prisoner being arraigned pleaded not guilty.

The prisoner, a lad of sixteen, gave evidence and denied that he had stolen the skins or wool. He stated that he bought the produce from the complainant's wife, giving her 5s. for the skins and 4s. for the wool. He further stated that he sold the woman goods amounting to 11s. and that he received the difference (2s) from her in cash.

The prisoner was found guilty and sentenced to six months' imprisonment.

The Magistrate made the following remarks on the case from which the further facts appear.

The man Hendrik Kafir, a respectable native farming on his own behalf, whilst away from home, is, on his return, told by his wife that the prisoner stole a certain number of skins and a bag of wool which were on his premises when he left.

His evidence as to his skins and bag of wool being stolen by prisoner is only hearsay, but he

finds seven of the skins and a bag of wool in the prisoner's room which he identified as his property.

He states there were twelve skins when he left home.

On his return he finds no more goods or articles than when he left, nor knows anything about a shirt (stated by prisoner in his evidence to have been sold to Kafir's wife for 4s. 6d., *Rep.*) when cross-examined, thus so far corroborating his wife, that no goods were bought, shirts included, from prisoner.

The wife Helena Rietkop, *alias* Dikkop, swears that she never bought anything from the prisoner, that she did not barter nor have any transactions with him, that she never sold him the skins or wool, that the latter articles he took against her will, and after the prisoner had left she missed a prepared goatskin out of her house.

This skin Hendrik Kafir identified amongst the other skins.

The daughter Meitje saw the prisoner in the house and saw him take thereout the prepared skin. She also saw him take the bag of wool and skins from the side or back of the house and states that her mother (Helena) bought nothing from prisoner. She had no transactions at all with him.

In her cross-examination Meitje adhered to her statement, fully corroborated that of her mother, and both she and the witness Helena and Hendrik Kafir gave their evidence in a most satisfactory manner, convincing me that they spoke the truth, and contradicting *in toto* the evidence of the prisoner that he had sold certain goods to the woman.

To further investigate the point as to whether any transactions, as alleged by the prisoner, took place, whether any of the goods said to have been sold by prisoner to the woman were to be found on the premises of her husband, a trustworthy police-constable was sent to the place, some considerable distance from this.

The man Hendrik Kafir and the woman Helena being perfectly willing that their premises should be fully searched. After a minute examination nothing could be found. The constable mentions two bits of print which were pointed out by prisoner's brother, David Klaas, who accompanied him.

The constable suspected that David Klaas put them there, as he distinctly swears that when he examined the property of Hendrik Kafir and his wife the pieces of print were not there.

The conviction forced upon me was that the prisoner's brother, the said David Klaas, put the little bits of print where they were seen by the constable with the object of attempting to prove that they were pieces of the print which the prisoner alleged he sold to the woman.

The conduct of David Klaas was under such circumstances highly reprehensible.

I was fully satisfied with the evidence for the prosecution, especially that of the woman Helena and her daughter Meitje.

All the witnesses for the prosecution gave evidence in a manner very satisfactory.

I found the prisoner guilty of stealing the bag of wool and the seven skins, which Hendrik Kafir identified as belonging to him, and which the woman Helena and the girl Meitje saw prisoner take away.

The prisoner now appealed.

Mr. Justice Upington remarked that the case had come before him on review, and he had certified that the sentence was in accordance with substantial justice. As however the matter now came up on appeal he would cancel his certificate.

Mr. Schreiner, Q.C., in support of the appeal: The evidence of the woman Helena and of her daughter is past belief. It is absurd to imagine that the prisoner would, in the barefaced manner in which these witnesses have described, have entered the house and stolen the property. The truth is that the produce was bought at an under value but, however morally wrong this may be, it does not amount to theft.

The Court is in as good a position as the Magistrate to draw its own inferences from the facts. *Bisset's Case* (not reported).

The Magistrate's remarks are not part of the record, he is not obliged to give his reasons in criminal cases, and they should have no weight with the Court.

The conviction should be quashed.

Mr. Giddy for the Crown was not called on.

The Court dismissed the appeal.

The Acting Chief Justice said: The Court of Appeal has in certain cases reversed a magistrate's finding on facts. In this case, however, there is hardly an inference to be drawn in favour of the appellant. There is the evidence of three persons as to the theft, and to corroborate the statements made by them a policeman is sent down to search the complainant's hut. The prisoner states that he exchanged goods for the produce alleged to have been stolen, but on search being made by the policeman no such goods were found. While searching an attempt was made by a relative of the prisoner to palm off certain goods as those sold by the prisoner to the woman. In the case of Bisset, the conviction rested mainly on the unsupported evidence of a trap, and it was shown that the trap had a grudge against the prisoner.

In that case the Court thought it better that a guilty man should be allowed to escape rather than that a possibly innocent man should suffer. I do not see how we can interfere in this case. The sentence seems heavy, but that is a matter the Court cannot alter. Any representation on the subject must be made to the proper quarter. My opinion, under the circumstances, is that the appeal should be dismissed.

Mr. Justice Upington: I am of the same opinion. I am satisfied with the judgment of the Magistrate.

[Appellant's Attorney, G. Montgomery-Walker.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN. (Acting Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

LIQUIDATORS CAPE OF GOOD HOPE BANK v. DE BEERS CONSOLIDATED MINES, LIMITED, AND IMROTH. } 1894. May 21st.

Attachment *ad fundandam jurisdictionem*—Money.

This was an *ex parte* application by the liquidators of the Cape of Good Hope Bank for an order attaching certain moneys belonging to the second-named defendant, and in the hands of the Heidelberg Gold-mining Company, Kimberley, *ad fundandam jurisdictionem* in an action about to be instituted by the applicants against the abovenamed defendants. The petition set forth that one William Lawrence was manager of the Cape of Good Hope Bank (Limited), at Kimberley, from April 1, 1889, to February 28, 1890; that whilst he acted as manager aforesaid, to wit, on January 24, 1890, Lawrence acquired from one Henry Alfred Ward, by an agreement entered into between them on that date, one-fourth share or interest in and to all the rights and privileges which Ward then had in connection with certain farms called Oliphantsfontein and Benaauwdfontein, situated in Griqualand West, and to the machinery thereon in terms of certain agreements entered into between Ward and one Johannes Jacobus Wessels, the proprietor of the farms, dated respectively 28th October, 1887, 18th October, 1888, 9th February, 1889, 25th October, 1889, and 10th January, 1890. That by memorandum of agreement entered into between Lawrence and Imroth, dated 8th February, 1891, Imroth agreed at his own expense to investigate Lawrence's right and title to the said quarter share or interest in the farms, and to take such steps as he might deem expedient for the establishment or recognition of such right and title, and for that purpose Lawrence authorised and empowered Imroth to institute and prosecute such actions or proceedings as might be necessary, and agreed that upon the sale, disposal, or realisation of the interest claimed by him, or of the interest which might be established for him by Imroth, the first proceeds thereof up to a sum of £5,000 should be paid to him (Lawrence) and the whole of the remainder of the proceeds should go to and be paid to Imroth. That by a memorandum of agreement made between De Beers Consolidated Mines (Limited) and Imroth, dated 21st April, 1891, Imroth, in consideration of a sum of £15,000 then paid to him, gave to the said company the sole right to purchase for the sum of £45,000, exclusive of the said sum of £15,000, all his (Imroth's) title and interest in and to the said agreement between him and Lawrence, dated 8th February, 1891. That on 24th June, 1891, in an action for a declaration of rights brought by Lawrence against Ward and Wessels, the Supreme Court declared Lawrence to be entitled to quarter of any rights acquired by Ward by virtue of the agreements in respect of the two farms above referred to. That by memorandum of agreement made and entered into between Lawrence and Imroth on 29th June, 1891, Lawrence, in consideration of £5,000 paid to him by Imroth, ceded, transferred, and made over to Imroth all his (Lawrence's) share and interest in the said farms and under the said agreements. That the said interest was obtained by Lawrence from Ward by and through the assistance of one Coronel and B. and J. Lichthein by and with the money of the Cape of Good Hope Bank (Limited), with which Lawrence was at that time entrusted as manager, the purchase amount of the said share or interest being paid with the said bank's money advanced by Lawrence to Coronel and B. and J. Lichthein at a time when their accounts were overdrawn at the said bank, and without security or anything adequate thereto, and when they were unworthy of credit, and the said Imroth, at the date of the agreement of the 29th June, 1891, was well aware that Lawrence's rights had been so purchased with the said bank's money. The petitioners alleged that they were desirous of at once instituting an action against De Beers Consolidated Mines (Limited) and Imroth, to have it declared that

they are entitled to obtain and possess all Lawrence's rights. That Imroth is resident in Johannesburg, but that there are certain moneys in the hands of the liquidator of the Heidelberg Gold-mining Company (Limited) in Kimberley, to which he is entitled as a shareholder of that company, and the petitioners are desirous of attaching the said moneys *ad fundandam jurisdictionem* as against Imroth.

The prayer was for an order attaching the moneys in the hands of the liquidator of the Heidelberg Gold-mining Company, and allowing the applicants to sue Imroth by edict.

Mr. Sheil was heard in suppo.t of the application.

The Court granted the order of attachment, with leave to sue the defendant Imroth by edictal citation. The rule to be returnable on the 12th June, and personal service to be effected.

[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew.]

FERREIRA'S TRUSTEES V. FERREIRA'S EXECUTORS. { 1894. May 21st.

Mr. Rose-Innes, Q.C., on behalf of the applicants, the trustees in the insolvent estate of the late Ferreira, moved to make absolute the rule *nisi*, dated 7th April, calling upon the respondents to show cause why they should not be restrained from dealing with a one-third share of the farm Patentie, in the division of Humansdorp.

Mr. Searle, Q.C., for the respondents, consented.

The Court made the rule absolute.

The Acting Chief Justice said: The rule will be made absolute pending an action to be tried next term, the question of costs to stand over. The rule may stand as the summons. The main object of the Court in allowing the matter to stand over was the hope that the whole question would be settled by this application in an inexpensive way without further proceedings.

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte MEWES.—MEWES V. MEWES. { 1894. May 22nd.

This was the return day of a rule *nisi* granted on the 1st instant calling upon the respondent to show cause to-day why one-half of the surplus awarded to him in the plan and final distribution account in his insolvent estate, and at present in the hands of the Master, should not be paid to the respondent's wife (the present applicant), and the interest on the remaining half also paid to her for her maintenance and that of her minor child. In the petition on which the rule *nisi* was granted it was alleged that the respondent left Cape Town four years ago, that his wife had not heard from him for two and a half years, and that during this period he had not contributed to the support of his wife or minor child.

Mr. Maskew, for the applicant, now moved that the rule be made absolute.

Mr. Sheil, for the respondent, asked for a postponement until 12th June to enable the respondent to answer the allegations made in the petition, notice of the rule not having been served on him.

The Court granted the postponement until 12th June.

DU PLESSIS V. DU PLESSIS. { 1894. May 22nd.

This was an action for divorce instituted by Mrs. Du Plessis on the ground of her husband's adultery.

The parties were married at Worcester on August 14, 1877. There were three children of the marriage. The plaintiff prayed for a decree of divorce, custody of children, and equal division of joint estate.

Mr. Jones appeared for the plaintiff; the defendant was in default.

Malcolm Moffatt, clerk in the Colonial Office, produced the register containing the entry of marriage, which took place on August 14, 1877.

Mrs. S. H. M. du Plessis, the plaintiff, deposed that she was married at Worcester on the 14th August, 1877, to the defendant. After marriage they lived at Goudini, remaining there a year. Lately she had lived at Montagu. Her husband had always treated her badly. He had always been cruel and harsh, repeatedly striking her with his fist and kicking her. She knew

Sarah Windvogel, who was her cook. She had worked for witness for about five months. Sarah Windvogel lived in a separate house, close to the house occupied by witness and her husband. Witness had seen the defendant come out of this woman's house. About July last, witness went to Robertson, and was away all day. Subsequently, about a fortnight afterwards. witness was away at Montagu for the day. Witness left the defendant, who turned her out of the house on the 6th January. Sarah Windvogel was in the house at the time. The eldest child, a boy, was fifteen years of age; the next, a girl, nearly fourteen, and the third a boy of eight years old. After witness was turned out of the house, she returned on the next day, Sunday, when her husband turned her out again, and on the Monday she went to her parents at Robertson. Witness then instituted proceedings for judicial separation, and subsequently for divorce. Defendant had been charged before the Magistrate with cruelty between two and three years ago, when he was fined. As late as September last year she laid an information against defendant for cruelty, but afterwards withdrew the affidavit, the statements in which were true. Defendant was addicted to drink. Defendant had also ill-treated the children, and beaten them very much. He had been fined £5 for cruelty to the children. For these reasons witness did not consider defendant a fit and proper person to have custody of the children. There was landed property at Montagu belonging to the joint estate. There were also horses, cows, and fowls, &c. Witness had no property at the time of the marriage, when she and defendant were both very poor.

Sarah Windvogel, a coloured woman, deposed that she had been servant with defendant for some months. During the last two years she lived in an outhouse near their place at Montagu. Witness made an affidavit last February alleging adultery between herself and the defendant. These allegations were true. Defendant had committed adultery with her. On the first occasion this happened whilst plaintiff was away at Robertson. It happened in defendant's house. About a fortnight afterwards the same thing took place. This was whilst plaintiff was at Montagu. The last occasion was just after the new year. On this occasion a woman, named Barnard, caught them together. Witness was present when plaintiff was turned out by defendant. Defendant had treated the plaintiff very badly. Witness had frequently seen him strike plaintiff.

Frickia Barnard corroborated the statement of the last witness as to the adultery between defendant and Windvogel.

This closed the case for the plaintiff.

The action was undefended.

The Court granted a decree of divorce, plaintiff to have care and custody of the children, an equal division of the property of the joint estate to be made. Mr. A. A. Celliers, attorney, of Robertson, to be appointed receiver. Costs of the action to come out of defendant's share.

[Plaintiff's Attorneys, Messrs. Findlay & Tait.]

POTE V. PETERS.—PETERS V. POTE. } 1894. May 22nd.

These were cross applications, the first by the defendant in the action for the postponement of the trial of the case, which is set down for the 29th inst., and for its removal to the next Circuit Court to be held at Burghersdorp; and the second for leave to the plaintiff to amend his declaration by claiming the sum of £68 8s. 5d.. salary alleged to be due, instead of £25, the amount originally claimed.

Mr. Searle was heard on behalf of the first-named applicant, the defendant in the action.

Mr. Rose-Innes, Q.C., for the plaintiff.

The Court granted the plaintiff leave to amend his declaration, and the defendant leave to amend his plea, and postponed the trial of the case until July 12, with leave to the defendant, on showing sufficient cause, to apply to have the case removed for hearing to the Circuit Court at Burghersdorp, the costs of the present application to be costs in the cause.

SUPREME COURT

[Before Mr, Justiee BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

DU TOIT AND DE WAAL V. GREEFF. } 1894. May 25th.

Mr. Buchanan applied for provisional sentence for £283 18s.. due on two promissory notes signed by defendant in plaintiffs' favour.

Granted.

DE VILLIERS V. VLOK.

Mr. Shippard moved for judgment under rule 329 for £24 16s. 8d., balance of account for goods sold and delivered.

Granted.

DE VILLIERS AND CO. V. DIVISIONAL COUNCIL, CALVINIA.

Mr. Tredgold moved for judgment under rule 329 for £107 19s. 4d., less £50 paid on account, for work and labour done and money advanced.

Granted.

REHABILITATION.

On the motion of Mr. Shiel, the following rehabilitation was granted: John Francis Kendrick.

GENERAL MOTIONS.

THE PETITION OF GERT VIVIER AND OTHERS.

Mr. Molteno moved for authority to the Registrar of Deeds to correct certain errors in regard to extent and other particulars in the transfer deeds of the farm Marthinus Kloof, in the district of Riversdale, and to issue transfers in accordance with such amendment.

The Court made an order in terms of the Registrar's report.

HAYWARD V. HAYWARD.

Mr. Tredgold moved for a rule *nisi* requiring the respondent to show cause why applicant, his wife, shall not be admitted to sue him *in forma pauperis* by edictal citation in an action for restitution of conjugal rights, failing which for divorce.

The Court granted rule *nisi* for the defendant to show cause why plaintiff should not sue *in forma pauperis*, returnable 1st August, order to be published once in the weekly edition of the "Cape Times." On the return day full information to be given as to the respondent's present whereabouts, &c.

BADENHORST V. BADENHORST.

Mr. Maskew moved for the appointment of a *curator ad litem* to represent the alleged lunatic in proceedings about to be instituted to have him declared of unsound mind, and incapable of managing his affairs.

The Court granted the order, and appointed Mr. Sheil *curator ad litem*, the summons to be served upon the curator as well as the alleged lunatic; leave given to Mrs. Badenhorst to give her evidence on affidavit.

LYONS V. JEWISH PUBLIC SCHOOL. { 1894. May 25th.

Mr. Molteno moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against respondents for recovery of salary and damages for breach of contract.

Mr. Searle, Q.C., for the respondents, opposed the rule being made absolute on the ground that there was not a *prima facie* cause of action.

The position taken up by the respondents was that the applicant had himself broken the contract and that he had no cause of action.

His counsel however adhered to his opinion that the applicant had *probabilis causa*.

The Acting Chief Justice said: In these cases where petitions are referred to counsel, counsel has to satisfy himself that a *prima facie* case has been made out. The Court is not, however, bound by the certificate of counsel, and if the respondents can show that there is no *prima facie* case, the Court can go behind the certificate of counsel. Counsel in this case had all the facts before him, and adheres to his certificate that the applicant has a *prima facie* cause of action. There is nothing in the affidavits to show that counsel was wrong in granting the certificate. The merits of the case cannot now be discussed or decided upon. The rule will have to be made absolute, and leave is given to the applicant to sue *in forma pauperis*.

HEYDENRYCH V. VINCENT.

Mr. McLachlan moved for the attachment in execution of a judgment of this Court, dated 23rd November, 1893, of a certain inheritance or expectancy devolving on the defendant out of the estate of the late Charlotte W. Bergh.

The Court granted the order.

Ex parte DICKERSON. *Re* JAMIESON'S WILL. { 1894. May 25th.

Will—Validity.

The Court refused to decide on motion as to the validity of a will which was alleged to have been improperly executed.

This was the petition of John E. Dickerson of Kimberley, carpenter.

The petitioner alleged that he was the son-in-law of Catherine Jamieson—previously the widow Hunter—married in community of property to John Campbell Jamieson, who resided in Kimberley for upwards of fifteen years and was by trade a carpenter.

That the petitioner's wife (Sarah Elizabeth Dickerson), to whom he was married in community, being the sole surviving child of Catherine Jamieson, died at Kimberley in or about the month of May, 1888, the two children of the marriage being still living.

Catherine Jamieson died at Uitenhage in June, 1891, and John Campbell Jamieson in December, 1891, leaving property to the value of about £700,

After the death of Campbell and his wife their underhand duplicate mutual will was filed with the Master of the High Court.

No executor being named in the will, one Fulcher of Kimberley was appointed executor dative on 29th January, 1892, at a meeting of next of kin and creditors called for that purpose by the Master.

The petitioner only recently learned that the executor dative administered the estate and paid the net proceeds (£677 3s. 4d.) into the Guardian's Fund for account of "the unknown heirs of John Campbell Jamieson," who are believed to reside in Glasgow, Scotland.

After doing so the executor left for America, having no intention to return (as the petitioner believed).

The petitioner alleged that he had not seen the will filed with the Master, but he was informed and had reason to believe that the same was not properly executed by reason of its being signed and witnessed on two different occasions.

The prayer was that the Court might decide as to the validity of the will or grant the petitioner other or further relief.

A copy of the will was before the Court but not the will itself.

Mr. Searle, Q.C., for the petitioner.

The Acting Chief Justice said: No order can be made on the present application, especially in the absence of the will itself. The best course will be to institute an action to declare the will invalid.

[Petitioner's Attorney, W. E. Moore.]

Ex parte CARTER. } 1894.
CARTER v. STEWART. } May 25th.

Interdict.

The Court granted an interdict restraining a respondent from receiving certain moneys due to him and the applicant by the Government, pending the bringing of an action by the applicant for breach of contract.

The rule was ordered to stand as the summons.

This was an *ex parte* application for an interdict restraining the respondent from receiving certain moneys from the Public Works Department pending the bringing of an action against him by the applicant.

The facts are briefly these:

In November last the Public Works Department called for tenders for the erection of a bridge atSalt River, Van Rhyn's Dorp.

The applicant entered into an agreement with Stewart, who was then one of his workmen, that they should together tender under the name of Stewart & Co.

It was further agreed that if their tender was accepted the applicant should find the material, that he should draw the money from Government as it became due, that Stewart should superintend the erection of the bridge, and that on the completion of the work the net profits should be divided between the two.

Their tender was accepted and in February Stewart left for Van Rhyn's Dorp but did not (as the applicant alleged) proceed with the work.

On 1st April, Stewart received £153 from the Government contrary to his agreement with Carter, to whom he only refunded £45.

He then gave the applicant a power of attorney to draw the remaining moneys from the Public Works Department.

On 16th May the sum of £333 became due and Stewart telegraphed to the Public Works Department that he had cancelled the power which he had given Carter.

Thereafter the Public Works Department refused to pay the money to the applicant, who now stated that Stewart was endeavouring to obtain it.

The applicant alleged that Stewart was without means, and that if he were allowed to receive the moneys now due by the Government, he (applicant) would sustain damage, and that he had already expended on the work £340 18s. more than he had received.

The prayer was for an order restraining Stewart from receiving the money in question.

Mr. Molteno for the applicant.

The Court granted a rule *nisi* calling upon the respondent to show cause on 12th June why he should not be interdicted from receiving the funds in question, the rule to operate as an interim interdict.*

[Applicant's Attorneys, Messrs. Scanlen & Syfret.]

TOWN COUNCIL OF CAPE TOWN v. HIDDINGH'S EXECUTORS. } 1894. May 25th.

Expropriation—Land burthened with a *fidei-commissum*—Act 26 of 1893

The Town Council of Cape Town can, under their Act 26 of 1893, expropriate for public

* On the return day the rule was made absolute The rule to stand as the summons and the action to be brought without delay.—*Rep.*

purposes land burthened with a fidei commissum, within the limits of the Municipality.

This was an action instituted by the Town Council of Cape Town to have it declared that the plaintiffs were entitled to expropriate certain landed property registered in the name of the late Jonas Michiel Hiddingh, situate in Waterkant-street, Cape Town, upon payment of compensation as fixed by arbitration, and that the terms of Act 6 of 1882, including more particularly section 4 thereof, applied.

The declaration, after referring to the parties to the suit, alleged that:

By deed of transfer dated 5th May, 1886, certain landed property situate in Table Valley, known in 1876 as the Ship Tavern, and now known as the Table Bay Hotel, was transferred to Jonas Michiel Hiddingh, in whose name it still stands registered in the Deeds Registry of this colony.

In accordance with the powers vested in the plaintiff by Act 26 of 1893, the plaintiff has caused to be prepared a plan of a certain work and undertaking, to wit, the extension of St. George's-street in the city of Cape Town, and has duly resolved to carry out the said plan.

The plaintiff requires, for the purposes of the said work and undertaking, to take the landed property aforesaid in accordance with the provisions of section 175 of the said Act, and has duly given notice to the defendants of its intention to expropriate the said landed property for the said purposes, but the defendants wrongfully and unlawfully deny the right of the plaintiff to take and expropriate the said landed property under the provisions of the said section, and of section 186 of the said Act, in case of arbitration for the purchase of the said landed property, whereby the provisions of Act No. 6 of 1882 are incorporated in the said Act.

Wherefore the plaintiff prays for an order declaring that the Town Council of the City of Cape Town is entitled to expropriate and purchase the said landed property upon payment of compensation determined in accordance with the provisions of sections 175 and 186 of the Act No. 6 of 1893, and of the provisions of Act No. 6 of 1882 in case of arbitration, or that the plaintiff may have such further or other relief as may seem meet, with costs of suit.

The defendants, after admitting the formal allegations in the declaration, specially pleaded as follows: The said Jonas Michiel Hiddingh, in whose name the said property still stands registered, died on the 26th December, 1888, leaving his last will and testament duly executed.

In terms of the said will the testator bequeathed the property in the declaration referred to to his nephew, Michiel Hiddingh, but burdened with the entail of *fidei-commissum* in such manner that the said legatee should have the use and enjoyment thereof for the term of his life; that at his death his eldest male descendant should enjoy the use of the property upon the same conditions, and that the property should similarly descend through each generation to the eldest great grandson of the said legatee, upon whom it should devolve as free and unencumbered property.

It was further provided by the said will that neither the said legatee, his son, or grandson, should have any right or power to sell, mortgage, burden, or in any way alienate the said property, nor should it be attachable or executable for their debts, and provision was also made in case the said legatee Michiel Hiddingh should die without leaving male issue, that the said property should devolve upon certain grandchildren of the testator, and upon their male descendants, upon the same conditions in which it was bequeathed to the male descendants of the said Michiel Hiddingh.

The defendants ask leave to refer this honourable Court to the terms of the said will as set out in the annexure "A" hereto.

The said Michiel Hiddingh is still living and is unmarried, and of the two grandsons of the testator one still survives.

The defendants do not admit the allegations in paragraph 3 of the declaration (the preparation of plans and extension of St. George's-street), and they refer this honourable Court to such proof thereof as the plaintiff may produce.

By reason of the premises the defendants say that the plaintiff has no right under the provisions of sections 175 and 186 of Act 26 of 1893, and of Act 6 of 1882, to expropriate the said property, and they say that the said Acts have no force in regard to the said property.

Therefore they pray that the plaintiff's claim may be dismissed with costs.

Issue was joined on these pleadings.

The facts alleged in paragraph 3 of the declaration having been admitted in court, no evidence was led.

Mr. Schreiner, Q.C. (with him Mr. Searle, Q.C.), for the Town Council: It may be laid down as a general principle of law that no private agreement can derogate from an Act of Parliament. The Act 26 of 1893 is a precedent in Municipal Acts, and singularly wide powers of expropriation are given under it. See sections

156 and 175. These sections are conclusive, and the powers of the Council to expropriate land under them cannot be affected by the fact that that land has been burdened with a *fidei--commissum*. It may be that the compensation given remains impressed with the trust and passes to the person who is, under the will, ultimately entitled to the freehold, but that cannot interfere with the powers of the Council under their Act. The property is land within the Municipality and can be expropriated.

Mr. Rose-Innes, Q.C. (with him Mr. Benjamin), for the defendants: Expropriation is a forced sale. By no forced sale can a buyer acquire greater rights than the seller possesses, unless the Legislature expressly so provides. Generally a buyer only acquires the seller's rights, though the Legislature may enable a seller to bind other parties. It is clear that in the present case the plaintiffs want to acquire greater rights than the executors have, or that the legatee has, and therefore the onus is on them to show that the Statute gives them power to acquire these rights. If the plaintiffs want to take land belonging to any person, then they must treat and agree with such person. See section 175. Nothing is said in that section as to property which though registered belongs only partly to the registered owner. There are such cases. A remainderman may have his rights registered. See *Lange* v. *Leisching* (Foord, 55). If the rights of remaindermen are about to be taken away they must be treated with. But the remaindermen in this case cannot be treated with, as there is no one who represents the eldest great-grandson of Mr. Michiel Hiddingh nor is he now before the Court.

Mr. Justice Upington referred to *Letterstedt's Case* (Buch. 1874, p. 42).

That case is of importance as showing that a *curator ad litem* may be appointed to represent at minor who is out of the jurisdiction.

Section 186 incorporates the mode of procedure in the Act 6 of 1882. The latter Act deals entirely with procedure, and for powers of expropriation that Act must be looked to.

The 4th section is taken from Act 9 of 1858, section 13, and only applies where the person concerned in any arbitration is a minor, it only deals therefore with cases where there are minors alive. Under sub-section (1) notice must be given to the guardian of the minor. See also sub-section (4), both of these sub-sections refers to minors *in esse*, in which case they must have notice. But in the present case who can represent generations yet unborn?

A special Act of Parliament has always been required to break an entail. Act 29 of 1877 was passed to enable Breda to sell part of Oranjezigt, yet at that time the Council had power to buy any land. See Act 1 of 1881, section 70. See also Act 23 of 1882.

In England express powers are given in such cases. See 8 Vic., cap. 18, section 7.

No machinery having been provided in Act 26 of 1893 the Council cannot expropriate this land without Parliamentary sanction.

Mr. Schreiner, Q.C., was not called upon to reply.

Judgment was given in favour of the plaintiffs.

The Acting Chief Justice said: The point at issue in this case is whether the Town Council is justified by its Act 26 of 1893 in compulsorily expropriating land which is entailed. The 156th and 175th sections of the Act taken together seem to me to mean that the Council are authorised to treat for the purchase of land for public purposes. If the parties are willing to treat but cannot agree to the price the 175th section of the Act provides a means of arriving at a price. The 156th section gives compulsory rights of expropriation to the Town Council. Then the question is, if they have these rights to compel the purchase or sale of land are the parties before the Court persons with whom the Town Council can treat? The property is registered in the name of the late Dr. Hiddingh, and his executors represent him in this Court. The executors were justified in not voluntarily treating with the Town Council and in obliging the Town Council to use their compulsory powers, seeing that the will contains such serious restrictions. Looking at previous judgments of the Court, it is too late to say that the executors do not represent all the persons interested. The executors could give a good title, and are the proper persons to be brought into Court. The Town Council having complied with all preliminaries under the 156th section of the Act, can compel the executors to sell the property. If this were not so, it would be possible for any private individual to bar or override a public Act of Parliament. As regards the administration or disposal of the funds so obtained by the expropriation, the executors must abide by the terms of the will. Costs must be given for plaintiffs, and must come out of the proceeds of the property.

Mr. Justice Upington concurred.

[Plaintiffs' Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte KIMBER.—*Re* KIMBER'S INSOLVENT ESTATE. } 1894. May 29th.

This was an application by the insolvent's wife for an order restraining the trustee from selling certain furniture and other effects partly settled upon the applicant by ante-nuptial contract, and partly acquired by her own industry, pending the bringing of an action to vindicate the same.

Mr. Graham for the applicant.

The Court granted a rule *nisi*, returnable on the 12th June, calling upon the trustee to show cause why he should not be restrained from selling the property in question pending the bringing of the action.

*MOGAMAT AND OTHERS v. MOLIAT. } 1894. May 29th.

Mohammedan Church—Imaum—Election—Congregation.

This was an action for a declaration of rights instituted by the plaintiffs in their capacity as Imaum, Gatieps, and Bilals of the Mohammedan Church of Jan van Boutjes van de Kaap.

The declaration was in the following terms:

1. The plaintiff Mogamat is the imaum or high priest, and the other plaintiffs are the office-bearers (gatieps and belals) duly appointed according to Mohammedan law and custom of the Mohammedan congregation of the Church of Jan van Boutjes of Cape Town, and they sue on behalf and as members of the said congregation. The defendant resides in and occupies certain house and buildings in Long-street, Cape Town, which have been set apart for the use of the said congregation in manner hereinafter set forth.

2. By her will dated 9th February, 1848, one Samida, widow of Jan van Boutjes, bequeathed the said house and buildings to certain six persons, being the then priest and office-bearers of the Mohammedan congregation of Jan van Boutjes, and directed that at their decease it should pass to their successors in the said offices in trust for the use of the said congregation as a church, that it should never be sold, alienated, or burdened, but should always remain the property of the said congregation.

3. After the death of the said Samida, to wit on the 20th day of January, 1861, transfer of the said property was passed by her executor to one Maamat in trust for the said congregation, and subject to the terms and provisions of her will aforesaid.

4. Thereafter the said Maamat died, and the defendant was appointed executor dative of his estate, and on 30th June, 1871, the defendant, as such executor, passed transfer of the said property to one Ismail, in his capacity as high priest of the said congregation, and to his successors in office, in trust for the purposes set forth in the will of the said Samida, and subject to the conditions thereof. The said property still remains so registered in the name of the said Ismail.

5. On or about the 21st October, 1871, the said Ismail and the defendant, who wrongfully asserted that he was an office-bearer (gatiep) of the said church, executed a notarial deed, in which they purported to rectify the transfer of the said property, passed to the said Ismail as aforesaid, and consented that the said property should stand registered in the names of the defendant and certain other persons, styled office-bearers, as co-proprietors with the said Ismail. A memorandum was thereupon endorsed by the Registrar of Deeds upon the title of the said property, referring to the fact that the said deed had been executed as aforesaid. The plaintiffs say that the said deed was null and void and of no effect in law, and that the endorsement of the said memorandum upon the said title was also illegal and of no effect.

6. Thereafter the said Ismail died without having nominated his successor in the office of high priest. The defendant thereafter wrongfully and unlawfully claimed to be the imaum or high priest of the said congregation, and wrongfully and unlawfully took possession of the said premises, which he continues to occupy and the profit arising from which he has drawn, and still draws for his own use and benefit.

7. The defendant wrongfully and unlawfully prevented the plaintiffs, or the congregation or any members of it, from having access to the said premises, and he has, since the death of the said Ismail, prevented any services being held on the said premises, and has deprived the congregation aforesaid of the exercise of their rights under the will of the said Samida; and he denies the right of the plaintiffs to have the said property transferred to them in trust for the said congregation.

8. By reason of the wrongful conduct of the defendant in the premises, the plaintiffs as representing the said congregation have suffered damage to the extent of £100.

*See *Jan and Others* v. *Ismael and Others* (5 Searle 102).—REP.

The plaintiffs claimed:

(*a*) An order declaring that the deed executed by the said Ismail and the defendant on the 21st October, 1871, is, and was, null and void, and directing that the memorandum relating thereto shall be erased from the title deeds of the said property.

(*b*) An order declaring that they as the high priest and office-bearers of the church of Jan van Boutjes are entitled to transfer of the property aforesaid in trust for the congregation of the said church, and subject to the terms of the will of the said Samida.

(*c*) An order compelling the defendant to quit the said premises, and to allow the plaintiffs and the members of the said congregation free access thereto.

(*d*) An order interdicting the defendant from in any way interfering with the free use of the said premises and the members of the said congregation as a Mohammedan church.

(*e*) Payment of £100 damages.

(*f*) Further relief, with costs of suit.

The defendant in his plea denied that the plaintiffs were the imaum and office-bearers of the church of Jan van Bontjes, and that they were entitled to sue him on behalf of the congregation of that church.

He admitted that he resided in and occupied a certain portion of certain premises in Long-street, and said that a certain other portion of the said premises is, and has been for a long time past since the foundation of the said church, used by the congregation as a place of worship. He denied the other allegations in paragraph 1 of the declaration, save as above admitted.

As to paragraph 2 of the declaration, he craved leave to refer to the will for the terms thereof, and said that the six persons mentioned therein are now dead.

As to paragraph 3, he craved leave to refer to the transfer deed for the terms thereof.

He admitted paragraph 4, and craved leave to refer to the deed of transfer.

As to paragraph 5, he admitted the execution of the notarial deed of October 21, 1871, and said that at that date he held office as gatiep of the said church; that the deed was entered into with due and proper authority, and he denied that it was invalid and of no effect, and he craved leave to refer to the deed for the terms thereof.

He denied that the said Ismail died without having nominated a successor. He said that he (the defendant) was nominated a successor, and upon the death of Ismail became and was recognised as imaum, and has continued ever since to perform the functions of imaum of the said congregation; that he now is in lawful possession of the premises as such, and that any rents and profits arising therefrom are devoted to the repairs of the said premises and to payment of taxes; save as above, he denied paragraph 6.

As to paragraph 7, he denied the allegations therein, and said that the plaintiffs and the congregation have at all times free access to the said premises for purposes of worship; he admitted that he denied the right of the plaintiffs to have the said property transferred to them.

He denied that the plaintiffs had sustained any damage through any wrongful conduct of him the defendant. He said that the plaintiffs were not entitled to maintain this action, seeing that the said deed, in paragraph 6 referred to, was of full force and effect, and a memorandum thereof was endorsed upon the transfer deed of 30th June, 1871.

Wherefore he prayed that the plaintiffs' claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Rose-Innes, Q.C. (with him Mr. McLachlan), appeared for the plaintiffs.

Mr. Searle, Q.C. (with him Mr. Graham), for the defendant.

Abdol Rakiem, member of the congregation, one of the plaintiffs, deposed that he was one of the parties to the action of 1866. He knew Mahommedan law in regard to church matters. The imaum was appointed by the whole congregation, and when he died a fresh one is selected. If the imaum misconducts himself the congregation had the power of deposing him. A roll of the congregation was kept, and if a man did not go to church regularly he was left out; but there was no law to that effect. On the death of an imaum a meeting was called to appoint his successor. The elder took the chair, and if there were two candidates the congregation made the choice. Witness was present at the meeting last November. The meeting was held in the chapel in Keerom-street. The oldest high priest took the chair. At that meeting Mogamat was chosen as imaum. In 1890 they brought an action in the Magistrate's Court, which was thrown out. The defendant then entered into the premises in dispute. Defendant was never given leave to occupy the premises. Since defendant had been in possession they had not been able to hold service on the premises. There were seven rooms besides the mosque. No part of the congregation attended the mosque. He knew nothing about the deed between Ismail and defendant until the case came before the Magistrate. He had

known defendant over thirty years. Fifteen years ago defendant went to Wynberg, and it was only after the Magistrate's decision that he took possession of the premises.

Cross-examined: Ismail acted as imaum up to his death. Witness went to the church up to the time of Ismail's death. After that he went to the big church. All the plaintiffs went to the big church. There had been no Friday church there for the last four or five years, nor nor did they attempt to have a service there. Prayer meetings were held since Ismail's death. For years before Ismail's death witness had only occasionally gone to service on the premises: he had always gone to the big church on Fridays. All the plaintiffs ceased going to Jan van Boutjes' after Ismail's death; if service had been held they would have. Children were members by virtue of their fathers having been members, and from the original source there might be 500 members of Jan van Boutjes' church spread over the country.

Re-examined: They wished to hold services in Jan van Boutjes' church if they were allowed. Defendant was not entitled to conduct services.

Salie Abdol deposed that he was a member of the congregation at Jan van Boutjes. He corroborated the evidence given by the first witness as to the election of an imaum. He knew that defendant claimed to be in lawful possession of Jan van Boutjes' church. When Ismail died, witness read the prayers in Jan van Boutjes' church for 140 days. The family asked him to conduct these services. Defendant never was a member of Jan van Boutjes' church.

Cross-examined: Witness had a chapel in Keerom-street. A man could be a member of several churches. Witness was still a member of Jan van Boutjes' church. He could vote at the election of an imaum for that church. Defendant had helped Ismail in the service.

Re-examined: If defendant gave up possession the congregation would again worship on the premises. Witness's chapel was started after the case came before the Magistrate and so as to prevent trouble.

Abdol deposed that he was a marabout at Jan van Boutjes'. Witness knew all the people who regularly worshipped at that church, and he called the meeting. He called about eighty people, but about sixty attended. Witness was at the meeting, which was unanimous in the election of Mogamat.

Cross-examined: He had once said a prayer on a fast day at the defendant's house since defendant had been there. Witness had never been hindered from going there.

Imaum Saheboo deposed that he was the oldest high priest in the Mohammedan community in Cape Town. He officiated in the Chiappini-street church. He corroborated previous evidence as to the method of electing an imaum. Magomat was duly elected.

Cross-examined: Witness had never conducted services in Jan van Boutjes' church. Although Moliat was eighty years old, he was a boy to witness. Moliat's son was imaum at Kimberley. Witness had nothing to do with the church at the time Ismail died.

Re-examined: He would not appoint officials without the approval of the congregation.

Khabi Ismail deposed that she was widow of Ismail, the former imaum. Whilst her husband was alive she lived on the premises in Long-street. Defendant drove her out of the premises. Defendant left to go to Wynberg because of a dispute as to some money. Defendant had received two years' rent, which he would not give up. The rooms brought in £1 19s. per month. Ismail never told her that he had signed any document.

Cross-examined: Before the dispute occurred Moliat conducted the services whenever Ismail could not do so.

For the defence,

The defendant (Moliat) deposed that he was born in 1814. In the time of Ismail he was an office-bearer in Jan van Boutjes' church. Up to the time professors from Arabia gave an order for Friday's service to be held in one church, witness officiated in Jan van Boutjes' church. This was about six years ago. Witness was in Wynberg about nine years, but came back after Ismail's death. Witness went to Ismail's widow, who gave him the deed of transfer. In July, 1890, witness took possession. He had paid up £42 11s. 6d. for arrear rates, and £10 12s. for repairs. After giving credit for rents received there was a balance of £6, which witness had in hand. Witness did not know of the meeting to elect an imaum. Plaintiffs had never come to him to complain personally. Witness had held service on holy days in the church and twice a year he mounted the pulpit. None of the plaintiffs had ever told him previous to November, 1893, that they were office-bearers in Jan van Boutjes' church.

Cross-examined: None of the plaintiffs had ever been office-bearers since 1870, when he came to the church. The people who were complaining were all children. He was imaum of the church of Jan van Boutjes, but the congregation had nearly all gone away. He claimed Ismail's place, but the congregation never elected him. This was not necessary. Witness had lived in the house nearly four years. He did not draw two years' rent and not account for it. Whilst

he was at Wynberg he did not attend services at Jan van Boutjes.

After argument,

The Acting Chief Justice said: It appears that as far back as 1848 certain property was left to the priests, deacons, and others of Jan van Boutjes' church and their successors under the will of Samida, the widow of Jan van Boutjes. The property so left has been the matter of litigation on frequent occasions. After the death of Samida, one Mahmat, as high priest, had the property transferred to him by the executor under the will. Mahmat died, and the defendant was appointed executor dative of his estate, and as such executor passed transfer to one Ismail, in his capacity of high priest of the congregation, and to his successors in office. Ismail had attempted by deed to appoint the defendant as his successor, but the Court held that an imaum had no such power. In an action as far back as 1866 the Court declared that Ismail and others named, amongst whom were the first three plaintiffs in this case, were entitled to the church in trust, under the will of the said Samida. After this the said Ismail and the defendant executed a notarial deed, by which they attempted to transfer the property into the names of the defendant and certain other persons styled office-bearers as co-proprietors with the said Ismail, but a notarial deed cannot convey landed property. This can only be done by a proper transfer executed before the Registrar of Deeds. The property now stands registered in the name of Ismail as imaum and his successors in office. We cannot in this action give an order on the first prayer that the deed executed by the said Ismail and the defendant on the 21st October, 1871, be declared null and void, as the parties to that deed are not represented. I may, however, point out that, by Act of Parliament, where property is left to religious societies it is not necessary to transfer the property from time to time. The question which is attempted to be raised in this case is, who are the successors of Ismail? On this point we are of opinion that both the plaintiffs and the defendant have failed. As to the plaintiff's claim, we cannot hold that a meeting held in the way shown by the evidence, without due notice to the defendant and other members of the congregation, for the election of an imaum, is legal. The second prayer for the ejectment of defendant, the defendant attempts to meet by saying he is the proper imaum of this church. Referring back to the judgment of 1866, it was there held by the Court that it is necessary for the congregation to approve of, if not appoint, the imaum of the church. That judgment shows that the consent of the congregation is essential to the appointment of an imaum. The defendant has failed to show either that he was elected imaum, or had the consent and approval of the congregation. It may be true that such consent might be given tacitly, but in this case the majority of the congregation have kept away from the church. Confining the issue to the legal point, as the property is registered in the name of Ismail as imaum, and his successors in office, the first three plaintiffs are the only persons who have any legal standing in the matter. The defendant must, therefore, be ordered to quit the premises on or before 1st July next. Judgment to that extent will be given for the plaintiffs, and also a declaration that the first three plaintiffs are entitled to call a meeting for the election of an imaum, such election to be made at a meeting of the church, after due notice has been given to the members of the congregation. As to the question of damages, that has been abandoned; so that there will be no order as to damages. As to costs, both parties have failed in the matter, and, following the precedent of previous cases, we think justice will be done in this case by ordering each party to pay their own costs.

Mr. Justice Upington concurred. He very much regretted that a case of this description should not have been settled amongst members of the Mohammedan community without coming to the Court. It had been a miserable squabble all through. It might be well if the parties were to consider whether some arrangement could not be definitely come to.

[Plaintiffs' Attorneys, Messrs. Walker & Du Preez; Defendant's Attorneys, J. C. Berrangé & Son.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

HAMPSON v. STUART. { 1894. May 30th.

This was an application for the postponement of the hearing of the appeal (from the High Court) in this case until some day after the 20th June next.

The case, a claim for the *pro rata* share of license moneys due upon twenty-eight claims in the Kamfer's Dam Diamond-mine from July,

1883, to December, 1891, was heard in the High Court on 8th March last, when absolution from the instance was given on the plaintiffs' claim. The applicants (original plaintiffs) now alleged that the date of expiration of the requisite three months from the day of the judgment within which to prosecute the appeal would fall on the 8th June next, and they were unable to complete the printing of the records and to attend to the other requisite formulae within the prescribed time owing to the late arrival of the records, and they prayed that the hearing of the appeal might be postponed.

Mr. Rose-Innes, Q.C., was heard in support of the application.

Mr. Schreiner, Q.C., opposed mainly on the grounds that the delay in prosecuting the appeal was caused by the applicants' neglect to pay stamps and find security.

The Court granted an extension to the end of the August term, on condition that the applicants give security for costs to the satisfaction of the Master of the High Court. The applicants to pay the costs of the present application.

MOLONY V. THE COLONIAL GOVERNMENT. } 1894. May 30th.

Contract—Breach—Medical attendance—Fees—Reasonableness.

This was an action instituted by Dr. Martin Molony, of Beaufort West, against the Colonial Secretary for the sum of £203 7s. 2d.

The declaration alleged that:

During the periods from 15th May, 1890, to 14th November, 1892, from 17th November, 1892, to 13th February, 1893, and from 22nd March, 1893, to 29th April, 1893, the plaintiff, at the special instance and request of the defendant, attended one James Sullivan, a constable in the employment of the defendant, professionally, and rendered to him professional services, and supplied him with medicines.

That in respect of the above services rendered, and medicines and other necessaries supplied during the illness of the said Sullivan, and in respect of a certain certificate supplied to the Magistrate's Office relating to the said illness, the defendant became liable to pay to the plaintiff the sums of £75, £104 9s. 2d., and £23 18s., or the sum of £203 7s. 2d. in all, as appeared from the account annexed.

The plaintiff claimed judgment for £203 7s. 2d., with costs.

The defendant in his plea denied that the plaintiff attended Sullivan professionally from 15th May, 1889, to 14th November, 1892, and from 17th November, 1892, to 13th February, 1893, and from 22nd March, 1893, to 29th April, 1893, at the instance or request, special or otherwise, of the defendant, or that the defendant ever requested or authorised the plaintiff to supply medicines or necessaries to Sullivan.

The defendant said that on the 17th November, 1892, he requested the plaintiff to professionally attend Sullivan owing to the non-attendance of the District Surgeon, as the plaintiff was well aware, and that the plaintiff did on that date and thereafter attend the said Sullivan.

The defendant said that the charges of the plaintiff for the said attendance were wholly unreasonable and exorbitant; that if the plaintiff did pay 161 visits to Sullivan, as alleged in his account after 17th November and up to the 13th February, that such attendance was not authorised or requested or agreed to by the defendant and were unnecessary, and that the plaintiff was never authorised or requested by the defendant to attend professionally the said Sullivan in the month of March, 1893, or to pay forty-four visits between the 22nd of March, 1893, and the 29th April, 1893, and that if he did pay such visits that they were not authorised or requested or agreed to by the defendant and were unnecessary.

The defendant finally alleged that there was only due to the plaintiff the sum of £35, which amount he tendered with costs to date of tender, and prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Searle, Q.C., and Mr. Tredgold appeared for the plaintiff.

The Attorney-General and Mr. Giddy for the defendant.

The plaintiff (Dr. Martin Molony) deposed that he had practised at Beaufort West for nearly six years. He first attended Constable Sullivan early in May, 1889. That was in consequence of the refusal of the District Surgeon to attend him. Witness sent an account to Sullivan, who sent it to the Colonial Secretary. The amount was £25, and was sent in July, 1892. Subsequently witness rendered another account for £75 to the Government. This was at the request of Sullivan. The Magistrate wrote authorising the attendance in November, 1892. Witness heard nothing from the Government. Witness wrote, in answer to the Magistrate's letter, accepting the authority. Witness afterwards regularly attended the man, who was suffering from heart and kidney disease, acute dropsy, and angina pectoris. The account put in was an account of the actual visits paid to the man.

The attendances were by night as well as by day. The visits were all necessary. The man got much better under witness's treatment. Witness ordered prescriptions to be made up by the chemist for which witness was liable. Witness was also liable to pay for brandy. His usual charge was 10s. 6d. for a day visit and £1 1s. for a night visit. At one period Sullivan was convalescent but afterwards became worse, when attendance recommenced. Witness first got instructions on the 1st May, 1893, to desist visiting Sullivan. Afterwards, on the 8th May, witness received a letter from Government stating that the District Surgeon would adjust the accounts, to which witness replied that he had received instructions from Government and did not see the necessity of the mediation of a third person. Witness wrote for payment in August, 1893, and again in January last.

Cross-examined: The dropsy began in 1892. The account was sent in by Sullivan to Government with the knowledge of witness. The account for £25 was for three years' attendance. Sullivan got worse afterwards. The man was ill enough to require at times two visits a day. Witness told the man on November 14, 1892, although he was dangerously ill, that witness was sorry he could not attend him any longer. On the 16th November, 1892, Sullivan telegraphed "Seriously ill. Am I to die without a doctor?" The usual charge at Beaufort West, or other country village, was about 6s. He might have charged less than this. Sometimes he charged nothing. Witness was afraid the action of the man's heart might suddenly stop, and that was the reason of the frequent visits. The only account the Government got before they engaged witness was the one for £25 for three years' attendance.

Christian Laurence Herman, medical practitioner, Cape Town, deposed that he had been practising about twelve years. He thought £1 1s. was the universal charge for night visits. That was the charge in Cape Town. Half a guinea for a day visit was a reasonable charge. In the case of a man suffering as Sullivan was, it might be necessary to pay frequent visits. Twice a day as an average would not be too often.

Cross-examined: Witness had no poor clients. They were fairly well off. Doctors had no fixed tariff; the charge would vary according to a man's income. Sometimes he charged 5s. a visit. That was the average charge in Cape Town. Charges for a second visit were sometimes modified.

By the Court: With benefit societies it would be impossible to work out the charge per visit. In an epidemic the number of his visits might be enormous. When there was good health visits would be few.

George William Ford, medical practitioner, deposed that he had practised six years in Caledon and three years in Worcester. His usual charges for night visits in the country were 10s. 6d. at night and 5s. for day visits. With well-to-do people these charges were 10s. 6d. and £1 1s.

For the defence,

Henry William Drew, district surgeon at Beaufort West, deposed that he had practised there twenty-two years. The usual charges in Beaufort West to people in a humble position were 2s. 6d. to 5s. in the day time. With benefit societies the charges were 1s. to 2s. 6d. per day visit, including medicines. Night visits were charged double. He got £75 a year for attending on twelve constables and supplying them with medicine. Witness knew Sullivan, and had attended him for years before Dr. Molony. He examined Sullivan, and found he was unfit to work as a constable. Subsequently witness found Dr. Molony there, and thereupon witness did not attend.

Cross-examined: The constable told witness that Dr. Molony was attending him gratuitously. He knew that Government had threatened to make him pay Dr. Molony.

Mr. Searle, Q.C., was heard for the plaintiff; the Attorney-General for the defendant.

Judgment for plaintiff for £69 12s. 2d. and costs.

The Acting Chief Justice said: In this case the plaintiff sues the Colonial Government for medical attendance to a constable named Sullivan. The account annexed to the declaration shows that these attendances extend over three periods, between May 15, 1889, and April 29, 1893, amounting altogether to £203 7s. In regard to the claim for the first period, that has been abandoned. It is clear that the plaintiff had no authority whatever from the Government to attend Sullivan during this period. No implied contract is shown. Subsequently, however, in November, 1892, the Government instructed the Magistrate to engage a medical man in place of the District Surgeon, and the plaintiff undertook the attendance. The question to consider is, for how long was this attendance to continue. There is a great deal of force in the contention that the plaintiff was only intended to attend Sullivan during the illness from which he was suffering at the time the authority was given. Sullivan, after this illness, became convalescent, and was afterwards again taken ill. The plaintiff resumed his attendances, until, on the 1st May, 1893, a letter was sent by Government to the

plaintiff, containing a revocation of the order given to plaintiff. We are of opinion that the Government is liable for attendance between November 17, 1892, and the date of this revocation. The next question now is, what amount is to be allowed for these attendances? There are two points in connection with this, were the visits necessary and were the charges reasonable? On the face of it, it might look as if a number of the visits were not necessary. But medical witnesses have testified that these visits might be necessary for a person suffering from the disease from which Sullivan was suffering. There is no evidence given to the contrary. Under these circumstances we are bound to come to the conclusion that the visits paid were necessary. But the amount charged for each visit cannot be allowed. The evidence of Dr. Ford as to day visits being charged 5s. and night visits 10s. seems very fair. Taking that as the basis of our judgment, the total amount comes to £69 12s. 2d., and we give judgment for that amount. The tender of £35, under the circumstances, is insufficient, and costs must follow the judgment.

Mr. Justice Upington concurred. He regretted very much that Dr. Molony should have included in his claim £75 for which he had no more claim as against the Government than he had. It was very peculiar that there was nothing in the correspondence to show whether any report was made to the Government of the reasons why Dr. Drew refused to attend Sullivan, and of the action of the Government upon it. The letter of authority written to Dr. Molony is far from a satisfactory one. It would have been better if the official who wrote that letter had let Dr. Molony know what length of time the Government expected him to act.

[Plaintiff's Attorneys, Messrs. Tredgold & Co.; Government Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

HANAU V. KRUGER. { 1894. May 31st.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £700, with interest from 1st July, 1893, and that the property hypothecated should be declared executable.

Granted.

PRINCE, VINTCENT AND CO. V. OLINSKY.

Mr. Buchanan applied that the provisional order of sequestration be made final. The provisional order was granted on the 19th May.

Granted.

VAN RYN AND COMPANY V. SECRETAN.

Mr. Molteno applied for judgment on a debt of £299, due on three promissory notes, and costs.

Judgment granted by consent.

HAND AND OTHERS V. SAMEY.

Mr. Graham applied for the final adjudication of defendant's estate. The provisional order was granted on May 18.

Granted.

WILSON V. MOSTERT AND ANOTHER.

Mr. Tredgold applied for provisional sentence for £242 10s., with interest from 5th September, 1889, due on mortgage bond, and that the property hypothecated be declared executable.

Granted.

REHABILITATIONS.

On motion from the Bar, the following rehabilitations were granted: Joseph Lucas Cooke, James Gibson, Daniel Bartholomew Truter, and John Henry Wicks.

Re THE MUNICIPALITY OF VILLIERSDORP.

Mr. Buchanan moved to make absolute the rule *nisi* for the attachment and sale in execution for the rates and taxes due thereon of certain lot of ground marked No. 20 in the village of Villiersdorp, transferred to Pieter H. de Villiers on the 20th May, 1836, abandoned and left derelict for many years.

The Court made the rule absolute.

IRVINE V. IRVINE.

Mr. Currey moved to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights.

The Court made the rule absolute.

CLAASEN V. GRUNDLING'S EXECUTORS. { 1894. May 31st.

This was an application, on notice, for a postponement of the hearing of the appeal in this case till the November term.

The action to set aside a will was heard in the Oudtshoorn Circuit Court on the 24th March last, and resulted in judgment being given for the defendants (the present respondents).

An appeal was immediately noted, but in consequence of not having yet received the reasons of the learned judge who presided at the trial. the applicant alleged that he had been unable to complete the record, and he prayed that the case might be ordered to stand over until the August term.

Mr. Sheil was heard in support of the application.

Mr. Searle, Q.C., opposed on the grounds that the applicant had not found security for costs; that the delay was occasioned by the applicant's negligence, and of the possible injury to the executors of having the estate hung up for three months longer.

The Court postponed the hearing of the appeal until the August term on condition that the applicant finds security for costs forthwith, the costs of the present application to be costs in the cause.

Ex parte STONE.

Mr. Watermeyer moved to make absolute the rule *nisi* for the issue by the Registrar of Deeds to the executor of the said estate of a certified copy of a mortgage bond passed by Smit's executrix hypothecating a piece of ground in Worcester-street, Graham's Town, for the sum of £150, in favour of the said James J. H. Stone.

The Court made the rule absolute.

Re MEYER'S ESTATE.

Mr. Webber moved for the appointment of a commission to take the evidence of the insolvent, and of other persons named in regard to their trade and dealings with him, and for an order that they do produce before such commission all books and documents relating to the said matter.

The Court granted the application and appointed the Resident Magistrate, Stellenbosch, and the Resident Magistrate, Paarl, to take the evidence of witnesses residing in those districts.

BOTHA AND ANOTHER V. PRINS.

Mr. Searle, Q.C., moved for an order requiring the respondent to join the agent of the executor of the late Regina Prins in giving transfer to the said Botha of certain portions of the farms Matjes Rivier and Gezwint's Kraal, situate in the district of Oudtshoorn. and that he do pay the costs of this application.

The Court granted an order in terms of the application.

Re THE UNION BANK. { 1894. May 31st.

Mr. Graham moved for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with certain debtors.

The Court gave the sanction applied for.

The following is the list of compromises:

John S. le Sueur, a debtor to the extent of £994 16s. 11d. on bills originally amounting to £900, exclusive of interest, offers £100 for a full release, the bank retaining all securities held, and reserving all rights against endorsers and third parties; £50 has been deposited, and the balance will be paid on the 15th of June.

Hamilton Ross & Co., debtors on bills originally amounting to £9,074 14s. 3d., now reduced to £1,899 3s. 7d., exclusive of interest, offer the sum of 4½d. in the £ on original claim—say £160, for a full release, the bank retaining all securities held, and reserving all rights against endorsers and third parties.

Mrs. H. Ruperti, a debtor to the extent of £936 14s. 6d. on an overdraft, offers a payment of £200 for full release.

Elias Harris, a debtor on bills to the extent of £1,988 16s. 11d., reduced from £2,801 17s. 10d., offers a cash payment of £100 for a full release, the bank retaining all securities, and reserving all rights against endorsers and third parties.

BEHRENS V. BEHRENS.

Mr. Graham moved for extension of the return day of the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights.

The Court made an order in terms of the application.

Re KIMBER'S INSOLVENT ESTATE.

Mr. Jones moved for the appointment of a commissioner to take the evidence of the insolvent and other witnesses.

The Court granted the application.

Mr. Buchanan was appointed commissioner.

BUDD V. BUDD AND FREEMAN. { 1894. May 31st.

Adultery—Divorce—Damages.

Where a woman, who was living apart from her husband under a deed of separation, and there was no hope of reconciliation between the parties, had committed adultery, The Court in an action for divorce by the husband refused to give damages against the co-defendant, a journeyman saddler, earning 5s. 6d. per diem.

This was an action brought by Allan Budd for divorce, by reason of his wife's alleged adultery with one Freeman. The marriage took place on the 19th April, 1891, and subsequently on April, 1893, a deed of separation was entered into. There was one child of the marriage. Plaintiff claimed:

(*a*) A decree of divorce.

(*b*) Custody of the child.

(*c*) £50 damages from the co-defendant.

(*d*) Costs of suit.

Mr. Tredgold appeared for the plaintiff; the defendants in person.

Allan Budd deposed that he was a printer, residing in Cape Town. He was married to the first defendant in April, 1891. He lived with his wife two years, and then they entered into a deed of separation on account of her getting him into debt. He had one child, a boy, two and a half years old. She went to live with her mother. Under the deed he agreed to allow his wife 5s. a week for the keep of the child. After his wife left him, in consequence of certain rumours, he watched her. He watched his wife and the co-respondent Freeman for seven months, and on the 20th March this year he followed them to Freeman's house in Buitenkant-street. He saw them together in Freeman's bed-room. Witness looked through the shutters, which were open. They remained in the bedroom about an hour. There was a light in the room. Five minutes after they entered the room the shutters were closed from the inside. Subsequently he witnessed similar occurrences. He afterwards followed them to Sea Point Common and saw them lying on the Common together. Witness wished to have custody of the child, who would be sent to his sister-in-law at Kimberley.

Cross-examined by defendant: He had never ill-treated his wife.

Defendant here admitted the adultery and asked for the custody of the child. She stated that the plaintiff had given liquor to the child and made him drunk.

By the Court: Witness paid the 5s. a week regularly.

James Munro deposed that he had lived in the same boarding-house with Mrs. Budd and the child. The child had not been properly looked after by the mother. As a rule the child was not kept properly clothed and was allowed to run about the street with a dirty face.

James Carrott deposed that so far as his knowledge went the mother had treated the child properly.

Elisabeth Yeomans (defendant's mother) deposed that plaintiff had made the child intoxicated when it was only nine months old. She did not think the plaintiff a proper person to look after the child.

James Wallis, a boarder at Mrs. Yeomans', said the child was well looked after.

The co-defendant admitted the adultery but, stated that he had only recently taken his discharge from the Royal Engineers and was unable to pay any damages.

At present he was working as a saddler and received 5s. 6d. *per diem*.

The Acting Chief Justice said: In this case there is no doubt the plaintiff is entitled to a decree of divorce. The next question is whether the plaintiff is entitled to damages against the second defendant. The husband and wife were living apart under a deed of separation, but this does not justify the wife in committing matrimonial offences. No doubt damages are allowed to a husband against a person who seduces his wife. These damages are supposed to be a solatium for the loss of his wife's society. In this case, however, it appears there was very little chance of a reconciliation. The question of damages is purely a jury question, and, looking at all the circumstances, we do not think this is a case in which any damages should be awarded. As to the custody of the child, by law no doubt the father is entitled to the custody of the child, but by the deed of separation he gave the custody of the child to the mother. The child is only two and a half years of age, and if the plaintiff got the custody he proposes to send the child to Kimberley. The grandmother expresses her willingness to take the custody of the child, and to keep it here where both parents can have access to it, and to properly look after

it. In the interests of all parties and of the child itself, the Court will grant the custody to the grandmother until the child is seven years of age, plaintiff and defendant to have access to the child at all reasonable times; after which age the custody of the child will be granted to the plaintiff, unless the Court should otherwise order. There will be a decree of divorce, with costs against the defendants.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

HUDSON v. BRADSHAW. { 1894. May 31st.

Land—Sale—Error in transfer deed—Declaration of rights.

In January, 1881, G. *became the registered owner of certain two pieces of land, one measuring one square rood, and the other* 21 *square roods and* 55 *square feet, with a cottage thereon, and thereafter he erected another cottage on his land.*

In February, 1883, G. *sold by public auction the first mentioned cottage, together with the land on which it stood, to* B., *who took possession and remained in occupation until* 1894, *and the remaining land and cottage he sold to* A.

In the deed of transfer passed by G. *to* B. *the land on which the cottage stood was not included, and through error transfer was only passed of the* 1 *square rood.*

B. *in ignorance of the error accepted the transfer.*

The transfer deed in favour of A. *included the cottage and remaining ground bought by* B., *the land being described as measuring in extent* 21 *square yards and* 55 *square feet.*

A. *thereafter sold the property as he had bought it, and eventually in* 1891 *it was purchased by* H. *according to transfer deed and diagram, but he did not become aware that it included the cottage purchased by* B. *until some time after the sale to him, when he had the land surveyed.*

In an action for a declaration of rights instituted by H. *against* B., H *was declared entitled to the cottage bought by* B. *in* 1883, *but compensation was given to* B. *in respect of improvements.*

This was an action for a declaration of rights instituted by Benjamin Doveton Hudson against Bridget Bradshaw, both of Claremont.

The declaration alleged that the plaintiff was the duly-registered owner of a certain piece of ground, with the buildings thereon, situate at Claremont, being part of lot No. 12 of the divided estate Mariendale, measuring 21 square roods and 55 square feet, transferred to him in due form of law on the 17th November, 1891.

That at the date of the said transfer a certain building standing upon the land now owned by the plaintiff was in the occupation and possession of the defendant, but that she was not in occupation of the said building by virtue of the leave, licence, or permission of the legal owner thereof.

Thereafter, in or about the month of December, 1892, the plaintiff gave notice to the defendant that the said building belonged to him, but the defendant refused to give up possession of the same, and in or about the month of February, 1894, the said building was destroyed by fire.

Thereafter the defendant, who wrongfully claimed that the land upon which the said building had stood belonged to her, unlawfully trespassed upon the plaintiff's property and commenced to rebuild the said building thereon, though the plaintiff warned her not to do so.

The plaintiff thereupon obtained a rule or order from this honourable Court interdicting the defendant from rebuilding the said house or occupying the same, pending an action to decide the ownership of the said house and the ground upon which it stands, and further ordering that the costs of the said rule should stand over. The ground upon which the said house stood before it was burned down and upon which the uncompleted structure still stands is the property of the plaintiff, but the defendant wrongfully and unlawfully claims that the said ground belongs to her, and that she is entitled to be declared the owner of the said ground and of the structure upon it.

The plaintiff alleged that he was willing, and hereby offered either to allow the defendant to come upon his land and to remove all the materials of the said building, or else to pay her the sum of £45 as compensation.

The plaintiff claimed:

(*a*) An order declaring that the said building in its present condition and the land upon which it stands is the property of the plaintiff.

(*b*) An order interdicting the defendant from trespassing thereon, subject to his offer above set forth.

(*c*) Alternate relief, with costs of suit, including the costs of the rule.

The defendant specially pleaded that:

The plaintiff had through error and mistake obtained transfer to more of the said land, with the buildings thereon, than he was lawfully entitled to. She said that on 18th January, 1881, one Thomas Gill became the registered owner of the land, with a cottage thereon, now in dispute, together with the land now lawfully owned by the plaintiff, upon which, at the said date, no cottage stood, together with a small piece of land of which she is now the registered owner, and that thereafter Gill erected the cottage now owned by the plaintiff.

Thereafter, on 19th February, 1883, Gill sold his land together with the cottage thereon. The defendant purchased for £100 the land with the cottage thereon now claimed by the plaintiff, together with a small piece of land now owned by and registered in her name, and one Samuel Abrahams purchased the remaining land with a cottage thereon.

At the said sale the beacons, together with the surrounding pieces of land with a cottage thereon, were pointed out to the defendant, and she has ever since been in peaceful possession and occupation of the said land and cottage so purchased.

Thereafter, in May, 1883, Gill, through error and mistake, conveyed to her a small piece of land, parcel of which she had purchased without any building thereon, and she in ignorance of the mistake, and in the belief that what she had purchased, namely, the land with a cottage thereon was being conveyed to her, accepted the transfer.

Thereafter in October, 1883, Gill through error and mistake conveyed to Abrahams the land with a cottage thereon, being the land now in dispute, and Abrahams thereafter sold to one Samuel Barnardski his land with the cottage thereon, and in continuation of the said error conveyed together with his own land her land with the cottage thereon, and Barnadski likewise through error and mistake conveyed to the plaintiff the defendant's land with the cottage thereon. Whereas the plaintiff purchased from Barnardski the land with the cottage thereon as purchased by Abrahams, and thus the plaintiff obtained transfer of the defendant's land with the cottage thereon in addition to the land and cottage purchased by him.

The defendant denied that she was lawfully bound to accept either of the tenders made by the plaintiff, and said that if she were so bound the sum of £45 was insufficient to compensate her, and she prayed that the plaintiff's claim might be dismissed with costs.

The defendant, in her claim in reconvention, alleged that in consequence of the interdict obtained by the plaintiff she had been deprived of the use and occupation of her cottage, and had incurred loss and damage.

The defendant claimed:

(*a*) A declaration of rights as to the ownership of the land and cottage.

(*b*) An order compelling the plaintiff to give her transfer of the land and cottage as purchased by her.

(*c*) A rectification of the transfers of plaintiff and defendant.

(*d*) £50 damages with costs.

On these pleadings issue was joined.

Mr. Rose-Innes, Q.C., and Mr. Sheil appeared for the plaintiff.

Mr. Molteno, for Bradshaw, defending *in forma pauperis*.

The plaintiff, Benjamin Doveton Hudson, deposed that he was the registered owner of a certain piece of land at Claremont, being lot No. 12 of Mariendal. He purchased the land in 1891 from one Barnardski. Witness inspected the title deeds and acquainted himself with the extent of the ground. He knew the locality well. When he agreed to purchase the property he was not aware that the cottage in dispute stood upon the land. No beacon or peg was shown to him. Mr. Maskew, the surveyor, afterwards surveyed the ground for witness. This was some time before the fire. The survey showed that the cottage was on his ground. In December, 1892, a letter was written by his attorney to the defendant, but he received no reply. No steps were taken to eject the defendant until the house was burnt down in February this year. Mr. Maskew told him what his beacons were in October or November, 1892. After the house was burnt down witness found men at work rebuilding it. Afterwards he saw the defendant and said she knew there was a dispute, and the men had better stop working. Witness then applied for an interdict, which was granted on April 7. Witness had offered £45 for the building as it now stands. The value of the material on the ground was not so much as that.

Cross-examined: Witness paid £115 for the property. He collected Barnardski rents for some time. The house was fenced off.

This closed plaintiff's case.

For the defence,

Thomas Gill deposed that he was a general dealer at Claremont. In 1881 he bought two pieces of ground. There was a cottage on one piece. Witness afterwards put up another house. The piece of ground was divided into three lots. Witness put up the properties by auction in 1883. He sold the properties just as he bought them. He sold the two cottages separately, and pegged them off before the sale.

He sold the thatched cottage to Mrs. Bradshaw. She paid £100 for it. The other cottage was sold to a Jew. He thought Samuel Abrahams was the name. Mrs. Bradshaw had occupied the house until it was burnt down.

Cross-examined: He thought that the piece of ground sold to Mrs. Bradshaw had a house on it. No demand had been made upon him to refund part of the purchase price.

James Ruck deposed that he was present at the sale in 1883. Mr. Welsh was the auctioneer, and that day two cottages were sold in two lots. He bid for one cottage £100 on behalf of Mrs. Bradshaw. There were two pegs, and Mrs. Bradshaw's fences now stood within these pegs.

Thomas Hohnwood, Claremont, deposed that he was present at the sale in 1883. Mrs. Bradshaw bought the cottage and the land up to the pegs, which were pointed out by Mr. Gill. So far as he knew Mr. Barnardski never claimed the cottage.

John Merrington, clerk to the Municipality of Claremont, deposed that Mrs. Bradshaw had been registered since 1887, and had paid rates on the property. Barnardski was also registered for one cottage. Plaintiff had only paid rates on one cottage.

The defendant, Bridget Bradshaw, deposed that she was the widow of the late Thomas Bradshaw. She authorised Mr. Ruck to purchase the cottage for her, and she paid £100 for it. The cottage was burnt down, and she had been rebuilding it until she was interdicted by plaintiff.

Majiet deposed that he lived at Claremont. He knew the property in dispute, and saw the pegs in the ground at the time of the sale.

Mr. Molteno was heard for the defendant and relied on *Saayman* v. *La Grange* (Buch. 1879, p. 10) and *Mostert and De Beer* v. *Smit* (5 Searle, 169).

The Acting Chief Justice said: In this case Mr. Gill owned two properties under two separate title-deeds. The properties adjoined. There was a cottage upon one, and Mr. Gill afterwards built a cottage upon the other. The property afterwards transfered to the defendant was described as containing one square rood. Under the other title-deed the property was described as twenty-one square roods. The latter property was sold to Abrahams, again to Barnardski, and afterwards to the plaintiff. What is practically asked by the defendant is that we should declare that Hudson should transfer a portion of the ground contained in his title deed to the defendant. If this were done there would not be much security in the registry of deeds office. In this case I fail to see what could entitle Mrs. Bradshaw to compel the plaintiff to transfer to her a portion of his property. It is true the plaintiff says he did not know at the time of the sale that the cottage was on the property, but he bought 21 square roods and 55 square feet of land on which the cottage in dispute stands and to that he must be declared entitled. I would be glad to assist Mrs. Bradshaw, and I think she has been hardly used, but whatever her right of action against Gill may be, it cannot be considered in this case. The plaintiff has been liberal in offering £45 as compensation, and is bound thereby in terms of the declaration. Judgment is therefore given for the plaintiff, and it is declared that the building in its present condition is the property of the plaintiff, but he must pay the defendant £45. There will be no order as to costs in this case, because the defendant has obtained the permission of the Court to defend *in forma pauperis*.

Mr. Justice Upington concurred.

[Plaintiff's Attorneys, Messrs. J. C. Berrangé & Son; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

HARVEY V. HARVEY. { 1894. May 31st.

This was an action brought by the wife, Myra Harvey, for divorce by reason of her husband's cruelty and adultery.

Mr. McLachlan for plaintiff; defendant in default.

Malcolm Moffatt, clerk in the Colonial Office, produced the original certificate of marriage between the plaintiff and defendant.

Myra Harvey, the plaintiff, deposed that she was married on 17th March, 1890. There was one child, who died. Her husband ill-treated her, and she left him and went to her parents on September 20, 1891. Her husband had not supported her since she left him.

Frederick Hall deposed that he knew the defendant and a girl named Fish. Defendant told witness that a child to which this woman gave birth was his.

Mary Churchfield, midwife, deposed as to the birth of the child. Defendant engaged her, and was in the room where the child was born three days afterwards.

Elizabeth Caroline Fish deposed that defendant was the father of her child.

The Court gave judgment according to the prayers in the declaration.

[Plaintiff's Attorneys, Messrs. Du Preez & Walker.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

JORDENS V. CAPE DIVISIONAL COUNCIL. { 1894. June 1st.

Divisional Council—Bridge—Negligence—Damages—Non-liability.

Where a bridge situated on a divisional road had been so constructed as to permit of one vehicle only crossing at a time, and two vehicles travelling at night and coming in opposite directions, had attempted to cross the bridge at the same time, and one of the vehicles coming in contact with the railing, which had fallen into disrepair, was precipitated into the river bed, the horses being killed and the vehicle damaged.

Held, *in an action for damages by the owner of the horses and vehicle, that the Divisional Council was not liable, the uprights of the bridge being capable of bearing the ordinary traffic, and there being no evidence to show that the bridge had become unsafe for such traffic.*

This was an action instituted by Franz Jordens against the Cape Divisional Council for £300 damages for negligence.

The declaration was in the following terms:

1. The plaintiff resides at D'Urban Road in the division of the Cape, and the defendant Council is the Divisional Council for the said division.

2. The main road from Cape Town to Somerset West passes along and over a certain bridge near D'Urban Road called the Twelfth Mile Bridge.

3. The defendant Council is by law charged with the duties of keeping in repair, preserving, and improving the said bridge, and it is the duty of the said Council to have and keep the said bridge in such good and sufficient repair as to prevent damage and injury therefrom to any person using the same.

4. In or about the month of August, 1893, the defendant Council was neglectful of its duty in that behalf, and had so negligently, improperly, and defectively constructed and repaired the said bridge that by reason thereof a certain cart and horses, belonging to the plaintiff, containing his wife and child, which were being driven over the said bridge on or about the 8th August, 1893, were on the said day precipitated from the said bridge into the river beneath, the child of the plaintiff and his horses being killed, his wife injured, and the cart much damaged.

5. The said accident was caused and the said cart and horses were precipitated from the said bridge by reason of the negligent and wrongful conduct of the defendant Council in not having and maintaining the said bridge in good and sufficient repair and preservation for public traffic.

6. By reason of the premises the plaintiff has suffered damage in the sum of £300 sterling, but the defendant Council refuses to pay him any part of the said sum.

The plaintiff claims:

(*a*) Payment of the sum of £300 sterling, being for damages as aforesaid.

(*b*) Such alternative relief as to this Honourable Court may seem meet.

(*c*) Costs of suit.

The Council in their plea admitted the allegations in paragraphs 1 and 2 of the declaration.

They did not admit that they were by law charged with the duty of improving the bridge referred to in paragraps 3 of the declaration, and denied that they were liable in respect of damages sustained in consequence either of accident or negligence on the part of any person injured or damnified, or on the part of any other person, but they admitted that they were under the duty of keeping the said bridge in a reasonable state of repair.

Save as aforesaid, the defendant Council denied the allegations in paragraphs 3 of the declaration.

The Council admitted:

(*a*) That on the 8th day of August, 1893, a cart and horses belonging to the plaintiff fell from the bridge to the dry river bed beneath, and that the horses were killed and the cart much damaged.

(*b*) That they refused to pay any sum to the plaintiff in respect of such damages. Save as aforesaid they denied the allegations in paragraphs 4, 5, and 6 of the declaration. The defendant Council said specially that the said cart and horses so fell as aforesaid in consequence of an accident over which they had no control, or in consequence of the negligence either of the person driving the said cart both before and during the time which the said cart came and was upon the said bridge, or of the person or persons in charge of a certain wagon drawn by oxen which at or about the same time came upon and was upon the said bridge and driving in the opposite direction to the said cart, and further said that the said bridge was not constructed or intended to permit at any one time

of the passage across it of more than one cart or wagon. Wherefore the Council prayed that the plaintiff's claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Innes, Q.C. (with him Mr. McLachlan), for plaintiff: Mr. Schreiner, Q.C. (with him Mr. Buchanan), for defendants.

Christina Jordens deposed: I am the wife of Franz Jordens, the plaintiff in the case. We have lived near D'Urban-road for about eleven years. We take produce regularly into Cape Town, and I go with the cart myself. I can drive horses. I used to drive them in Germany. Our horses on the morning in question were quiet. On the morning of 8th August last year I started about 5.10 to go to Cape Town. I got to the bridge about 5.30 It was dark and raining. I know the bridge very well. The road approaching comes with a curve on to the bridge, and there are trees. I had my little boy with me, aged ten years. There were two horses in the cart. My boy was on my right. Our load consisted of bread, wood, and eggs. There was a pretty good load of wood, and not much room for us to sit. I was driving at a short trot round the curve. When I got on to the bridge I made the horses walk. I met a span of oxen on the bridge. When I saw the oxen I called out to the man who was driving the transport wagon, "Stop." I stopped, and the oxen came on past me. The back part of the wagon scraped the off horse on the right side. The horse backed, the bridge cracked, and we fell down. My boy was killed, both horses were killed, and the cart was broken. The fall was between 30 and 40 feet. The value of the two horses killed was £25.

Cross-examined by Mr. Schreiner: I had just got on the bridge when I saw the oxen. I did not hear the oxen till I saw them. The leader of the oxen did not cry out "Stop." I did not strike the oxen with the whip. I did not move on after I had stopped. I have never passed a wagon on the bridge in the day time. When the bridge cracked I did not jump from the cart on to the bridge; I fell with the cart into the bed of the river. The moment I got to the bottom of the sluit and saw the condition of my son I got up and ran for help. The width of the bridge is 15 feet. I was on the left of the bridge, and the cart went sheer back and down.

John Andrew Duminy, Field-cornet, residing near the bridge, deposed that he visited the spot where the accident occurred at six a.m. on the morning of 8th August. The cart and horses were in the river, near the middle of the bridge. There was a breach in the railings. Witness traced the spoor of the cart. The left wheel of the cart was as close to the railings as nine inches before it backed. The left wheel must have struck the railing, and the cart gone over obliquely. The Divisional Council afterwards repaired the railings. The floor of the bridge was in a very bad condition. The supports of the railings were not sound. (Wood brought into court and identified.) The sleepers on which the lattice work was nailed were completely rotten. (Portions of the flooring produced.) That part of the bridge to which the uprights were nailed was fairly good. There is a good deal of traffic over the bridge. Witness had directed the attention of the former overseer of the Divisional Council to the state of the bridge quite nine months before the accident. Witness remarked to him, "You won't be satisfied till an accident occurs." No repairs were then made, but since the accident the Divisional Council put in nine new standards, and otherwise put the bridge in repair.

Henry A. Hamilton, living close to the twelve-mile bridge, deposed that he was a carpenter by trade, but at present kept a hotel. Witness knew the bridge. He once drew Mr. Johnston's attention to the state of the bridge—a disgrace to the community, both as regarded the approaches and the bridge itself. Mr. Johnston, who was an official of the Divisional Council, told witness the best thing he could do was to insure his life.

Cross-examined: Witness did insure his life, not because he feared the bridge but because of an approaching happy event.

Franz Jordens, plaintiff, deposed that his wife had considerable experience in driving, both here and in Germany. The repairs to the cart after the accident cost him £5. He valued the whole load on the cart at £5.

Nicholaas Russouw, roadmaker, residing near the bridge, deposed that he was called up on the morning of the accident at 5.30. He went down to the bridge. It was dark. Being employed by the Divisional Council he had felt it his duty a month before the accident to tell the inspector that the diagonal beams were rotten.

Cross-examined: The diagonal pieces were not the support of the bridge.

This concluded plaintiff's case.

For the defence,

Edward Gatty, Inspector of Roads for the Divisional Council, deposed that shortly after he succeeded to office in July, 1898, this accident occurred. Before the accident he gave notice that some repairs were necessary to the trellis-work near the end of the bridge. That had not the remotest connection with the accident. Along with Mr. Breecker, the head overseer, he

visited the bridge on the morning of the accident. The bridge would never stand the strain of a cart and wagon. The railing and trellis-work were just to prevent cattle and children falling over. The trellis-work would not stand the strain of a cart backing on it.

Cross-examined by Mr. Innes, Q.C.: Guide-rails were not uncommon, The uprights were sunk into the metal of the bridge. Since the accident occurred they had put on a new top-rail, and eight new standards. If the Council put a lamp on this bridge it would have to put one on every bridge in the division. From the spoor of the cart it was clear to witness that the cart must have backed sheer on to the railing of the bridge. Witness's theory was that the cart went over before it touched the wagon.

Mark Breacker, head overseer of the Divisional Council, identified the wood produced, and considered it good, sound teakwood. The cart would not have gone over if there had not been considerable pressure against the uprights of the bridge.

Frederick W. Johnston, former Inspector of Roads for the Divisional Council, deposed that road metal would come in contact with the uprights, but could not materially affect them. The bridge was only suited for one vehicle at a time. So far as the woodwork was concerned, it was quite strong enough for the strain of ordinary traffic. When this accident happened the strain must have been extraordinary.

Cross-examined: The bridge was built in 1863. Teak was almost everlasting.

By the Court: Bridges that were taken over from the Government had teakwood; bridges built by the Divisional Council had pitch pine.

Wm. Westerhoven, Engineer to the Public Works Department, deposed that the teakwood uprights were strong enough to bear any ordinary strain. The Inspector of the Divisional Council should report if repairs were necessary, but no such report or complaint had been received.

Cross-examined: The railings were more for ornament than use.

Mr. C. Lind, Secretary of the Cape Divisional Council, deposed that the bridge in question was constructed by the Government in 1862. Barring Mr. Gatty's representation, no complaint had been received from the public or Public Works Department.

Michael Otto, the leader of the ox-wagon which met the cart, deposed that he was across half the bridge before he met the cart. He called out, "Stop, there's a wagon on the bridge." The horses in the cart broke their pace, and walked. The woman struck the right leader of the oxen with a whip. Witness called out to his master to stop. The woman moved on with the cart. The oxen were drawn in towards the side of the bridge. Shortly afterwards he heard a crash, and he supposed the cart went over, and then the witness saw the woman at the end of the bridge.

Cross-examined: When I saw the cart I was at least eight or ten yards from the end of the bridge.

C. Diedricks, driver of the transport wagon, deposed that his wagon was loaded with about two tons. Witness corroborated what had been said by the "voorlooper."

This closed the case for the defence.

Mr. Rose-Innes, Q.C., was heard for the plaintiff.

Mr. Schreiner, Q.C., was not called upon.

Judgment was given for the defendant.

The Acting Chief Justice said: The plaintiff in his declaration alleges that the Divisional Council is by law compelled to keep in repair, preservation, and improvement the bridges which it has under its control. That is a statement of law taken from the 141st section of the Divisional Council Act. I agree with Mr. Innes that the bridges must be considered as part of the roads which the Divisional Council are bound to look after. It was contended that the Divisional Council were bound to improve the bridge by widening it. The evidence does not prove that the bridge is insufficient for the traffic. This bridge, like most other bridges in the Colony, is constructed to carry only one vehicle at a time. The traffic is heavy, no doubt, but there is no evidence to show that the bridge is not wide enough for the traffic. The important question is, was the Council so neglectful of the duty imposed upon it by statute, and so negligent as to allow the bridge to get into such a condition that this accident resulted in consequence of that neglect? To answer this it is sufficient for the Council to show that they have done all that may be considered reasonably necessary for the maintenance of the bridge. Certainly it seems to have been most substantially constructed by the Government. The uprights were made of teak, it had stood thirty or forty years without repair. If the Divisional Council had allowed these uprights to fall into a state of decay it would have thrown upon them the necessity of showing that the accident did not happen through their negligence. What was needed was that these uprights should not necessarily be able to resist any extraordinary strain, but that they should be capable of bearing the ordinary traffic along the roads. I think this bridge was sufficient for the ordinary traffic. After looking at the uprights which have been produced, I can-

not say that this wood was insufficient for the purposes. No doubt the trellis-work had been allowed to get into a state of disrepair, especially near the end of the bridge, but since the accident this had been repaired. Moreover, the trellis-work could not have contributed to the accident; everything rested on the uprights and they were not decayed. The question of contributory negligence has been raised, but it is not necessary to go into that. Plaintiff's wife knew it was a bridge for a single vehicle, and she ought to have exercised greater care. An extraordinary strain was put upon the rails in consequence of two vehicles meeting; and this most unfortunately resulted in the death of plaintiff's child and the loss of the horses. Under all the circumstances, judgment must be entered for the defendants with costs.

Mr. Justice Upington concurred.

[Plaintiff's Attorneys, Messrs. Du Preez & Walker; Defendants' Attorney, W. E. Moore.]

SMIT V. SMIT. 1894. June 1st.

This was an action for restitution of conjugal rights, failing which for divorce.

Mr. McLachlan for plaintiff; defendant in default.

Mr. Malcolm Moffatt, of the Colonial Office in charge of the Marriage Register, proved the marriage.

Isaac Smit, plaintiff, deposed: I am a farmer residing at Krom Rivier. I was married to my wife Anna on 3rd April, 1888. There are two children of the marriage. We lived happily together till September last, when she left me without cause. She wrote from Somerset saying she would not return. My wife removed from Somerset, and is now a servant with a Mrs. Du Toit. My wife is not staying with any relatives of mine. I am ready to receive her, but she will not come.

The Court warned witness to be careful.

Witness then admitted that his wife was now living with his brother, who kept her. She had one of the children. Witness had given his attorney £21 to get up the case, and his brother had given him something too.

Mr. Justice Upington: It is the most disgraceful case I have ever heard of. I believe this to be a case of the clearest collusion that ever was known in this Court.

The Acting Chief Justice refused the decree.

Mr. McLachlan said he knew nothing about this development of the case when he was instructed.

The Court exonerated counsel, but expressed surprise that such a case should have been brought into court.

[Plaintiff's Attorneys, Messrs. Du Preez & Walker.

KRIGE V. DE WAAL. 1894. June 4th. June 5th. June 6th. June 7th. June 8th. June 11th. June 12th. June 13th.

Election petition—"Bribery"—"Treating"—Agency.

This petition was presented by Mr. W. A. Krige, of Stellenbosch, who was a candidate at the last election for the representation of the division of Stellenbosch, against Mr. P. de Waal, at the date of the trial one of the sitting members for that division.

The petition was in the following terms:

The petition of W. A. Krige, of Stellenbosch, humbly showeth:

1. At a public court or meeting duly convened and held according to law, on the 19th day of January, 1894, your petitioner and certain other candidates—to wit The Hon. J. H. Hofmeyr, P. de Waal and P. J. Bosman—were duly nominated as members of the House of Assembly of this Colony for the Electoral Division of Stellenbosch.

2. Thereafter a poll was duly demanded, and was taken throughout the said division on the 26th January, 1894.

3. On the 2nd February, 1894, the Civil Commissioner, the returning officer of the said Electoral Division, declared the state of the pol to be as follows:

The Hon. J. H. Hofmeyr, 785 votes; Mr. P. de Waal, 534 votes; your petitioner (W. A. Krige), 524 votes; Mr. P. J. Bosman, 296 votes; and he thereupon proclaimed that the said Hofmeyr and the said De Waal had been returned and elected as Members of the House of Assembly for the Division of Stellenbosch aforesaid.

4. By proclamation in the "Government Gazette" of 9th March, 1894, the names of the said J. H. Hofmeyr and the said De Waal have been published as the elected members for the said Division.

5. The return and election of the said De Waal was undue and illegal by reason of corrupt practices and irregularity in the following respects:

(a) The said De Waal by himself, or by other persons on his behalf, gave or agreed to give, or

offered, promised, or promised to procure, or to endeavour to procure, money or valuable consideration to or for certain voters, or to or for certain persons on behalf of certain voters, in order to induce such voters to vote or refrain from voting at the said election, and did so far as certain of the said voters are concerned corruptly give or procure such money or valuable consideration on account of such voters having voted or refrained from voting at such election.

Your petitioner annexes hereunto a schedule marked "A," giving particulars of certain of the acts of bribery herein referred to. Particulars of the further acts complained of will be furnished hereafter.

(*b*) The said De Waal corruptly by himself or by other persons on his behalf gave or provided or caused to be given or provided, or was accessory to the giving or providing, certain drink to or for certain persons for the purpose of corruptly influencing such persons or other persons to give or refrain from giving their votes at such election, or on account of such persons having voted or refrained from voting at such election.

Your petitioner annexes hereto a schedule marked "B," giving particulars of certain of the acts of treating herein referred to.

Particulars of the further acts complained of will be furnished hereafter.

(*c*) The returning officer aforesaid has been guilty of irregularity in that he illegally, and by way of scrutiny after the votes had been recorded, struck off the votes of three voters which votes had been duly recorded for your petitioner, and which votes should have been added to the number set forth in the 3rd paragraph of the petition as having been given for him; and one G. C. Hauptfleisch has been guilty of irregularity in that being the paid agent of the said De Waal, he irregularly recorded his vote in favour of the said De Waal, which vote should have been deducted from the number recorded as aforesaid in favour of the said De Waal, and a vote recorded in favour of the said De Waal in the name of a voter who had died before the date of the said election.

Your petitioner annexes hereunto a shedule marked "C," giving particulars of certain of the voters so improperly struck out and recorded. and also the particulars of the vote wrongly recorded for the said De Waal in the name of a voter who had died before the date of the said election.

Particulars of the further irregularities complained of will be furnished hereafter.

6. If the votes given in favour of the said De Waal by the persons who were bribed or treated or who improperly recorded their votes as aforesaid be deducted from the number of votes declared by the returning officer to have been given for the said De Waal, and if the votes improperly struck off the number given for your petitioner be added thereto, it will be found that your petitioner has received more votes at the said election than the said De Waal.

Wherefore your petitioner prays that it may please your lordships to declare the election of the said De Waal to be null and void, and that your petitioner has been duly elected as member aforesaid for the said Electoral Division, and that he may have his costs of this petition, or that your lordships may make such further or other order as to your lordships may seem meet.

[Then followed the schedules "A," "B," and "C" referred to in the petition, and the supplementary schedule of particulars of further corrupt practices alleged to have been committed by or on behalf of the respondent.—*Rep.*]

The respondent filed the following answer to the petition:

1. The respondent admits the allegations contained in the first four paragraphs of the petition.

2. The respondent denies the allegations contained in paragraphs 5 and 6 of the petition, and in the several schedules annexed thereto, including the schedule of further particulars filed of record on 1st May, 1894.

3. As to section (*c*) of the paragraph 5 of the petition, the respondent says that if the returning officer should be held by this Honourable Court to have acted irregularly in striking off any votes once recorded, then the said officer acted irregularly in striking off as many votes for the respondent as for the petitioner, and of nine votes as struck off, and which had been recorded for the respondent, those set forth in the schedule marked 1 and hereunto annexed should be restored.

4. In respect of so much of the petitioner's prayer as claims a declaration that he has been duly elected as member for the Electoral Division of Stellenbosch. the respondent craves leave, if need be, under section 43 of the Act 9 of 1883, to lead evidence showing that the alleged election of the petitioner was undue as will more fully hereinafter appear.

5. The petitioner W. A. Krige, by himself or by other persons on his behalf, gave or agreed to give or offered or promised to procure or to endeavour to procure money or valuable consideration to or for certain voters, or to or for certain persons on behalf of certain voters, in order to induce such voters to vote or refrain from voting at the said election, and did so far as certain of the said voters are concerned corruptly give or procure such money or valuable

consideration on account of such voters having voted or refrained from voting at such election.

The respondent annexes hereunto a schedule marked II., giving particulars of certain of the acts of bribery herein refered to, the respondent craving leave, in case further acts of bribery should be discovered, to bring them also, under the aforesaid section, to the notice of this Honourable Court.

6. The petitioner corruptly by himself or by other persons on his behalf gave or provided or caused to be given or provided, or was accessory to the giving or providing, certain drink to or for certain persons for the purpose of corruptly influencing such persons to give or refrain from giving their votes at such election, or on account of such persons having voted or refrained from voting or being about to vote or refrain from voting at such election.

The respondent craves leave to refer to the particulars numbered 2 and 3 of the schedule marked II. hereunto annexed, and further to the particulars set forth in the schedule marked III. and also hereunto annexed, all which particulars he craves leave to supplement by further facts and evidence at the trial of this petition.

7. The petitioner by his agents Louis Krige (his son) and one Joel Naude wrongfully, unlawfully and corruptly induced one Dirk Jacobse, being a youth of 18 years of age, on the polling day to personate his deceased father, also named Dirk Jacobse (in his lifetime registered as a voter No. 237), and to proceed to vote at the polling-station at the Court House in Stellenbosch, where the said Dirk Jacobse did record a vote for the petitioner.

8. The respondent further says that some person not at present certainly known did on the polling day and at Stellenbosch wrongfully and unlawfully record a vote under the No. 308 in the name of Pieter Ley, the fact being that no such person as Pieter Ley, other than Pieter Charles Ley, also registered as No. 78 under the name of Pieter Charles, was entitled to vote; and that the said Pieter Charles Ley *alias* Pieter Charles voted under the number No. 78 in favour of the respondent and Hofmeyr.

9. The respondent further says that upon a scrutiny of the votes by this Honourable Court there will be found a clear majority in his favour.

Wherefore the respondent prays that the petition may be dismissed with costs.

[Then followed the schedules I., II., and III. referred to in the answer.—*Rep.*

Mr. Rose-Innes, Q.C., and Mr. Searle, Q.C., appeared for the petitioner; and Mr. Schreiner, Q.C., and Mr. Graham for the respondent.

The material points in the evidence and the authorities cited by counsel appear from the judgment.

The Acting Chief Justice said: At the recent election of members of the House of Assembly for the division of Stellenbosch, the candidates nominated for the seats were the Hon. J. H. Hofmeyr, the respondent, Mr. De Waal, the applicant, Mr. Krige, and Mr. Bosman. The poll was taken on the 26th January, and on the 2nd February the returning officer declared the result to be: For Mr. Hofmeyr, 785 votes; for respondent, 534 votes; for petitioner. 524 votes; and for Mr. Bosman, 296 votes; and he thereupon proclaimed Messrs. Hofmeyr and De Waal duly returned and elected. As a matter of fact, thirteen more votes had been cast for Mr. Hofmeyr. nine for Mr. De Waal, nine for Mr. Krige. and two for Mr. Bosman; but before declaring the state of the poll the returning officer had held a private scrutiny, and had struck off this number of votes. Both petitioner and respondent complain of this procedure, but both sides are content to take the poll as declared, and seek to restore some only of the votes so struck off. That the action of the returning officer was irregular is admitted; and on this point it will be sufficient to refer to the decision of this Court in the case of *O'Leary* v. *Lord* (6 Juta, 297), when the law was fully discussed. In view, however, of the other allegations contained in the petition and in respondent's answer thereto, it is unnecessary to dwell on this part of the case. The petitioner, Mr. Krige, alleges that the return and election of Mr. De Waal was undue and illegal by reason of corrupt practices committed by himself or by other persons on his behalf, in the bribery and treating of voters; and that if the votes of the persons so bribed and treated are deducted from Mr. De Waal's total, as well as the votes of certain paid agents which were improperly recorded, and that if certain votes improperly struck off by the returning officer were restored, it would be found that the petitioner had received more votes than Mr. De Waal. Mr. Krige therefore prays not only that Mr. De Waal's election be declared null and void, but also that he, Mr. Krige, has been duly elected. The respondent, in his answer, brings counter-charges of bribery, treating, and personation against Mr. Krige and his agents; and it is to these charges and counter-charges that the mass of the evidence and the arguments of counsel have been necessarily directed. There is not very much in dispute as to the facts, as many of the witnesses have plainly avowed their acts, and this was especially so in the case of the principal movers in the election. The persons affected by these charges can be

classified under three heads. First, the candidates themselves; secondly, persons acting in their interests; and thirdly, the voters who have been bribed and treated. Considering first the petition, there are two charges scheduled against the sitting member, both laid on January 24, two days before the polling, the one averring that he personally, at his residence, provided watermelons, beer, and wine for one Frederick Newman and five other voters, for the purpose of corruptly influencing them to give their votes on his behalf; and the other, that he, through his son Tielman de Waal, gave to the said Newman a cask of wine, to be used for the purpose of corruptly influencing voters to vote for him. As to the last charge, the only witness called to support it was Frederick George, who, besides being contradicted in some particulars by the person with whom he resided, was vague in his statements, and generally gave his evidence in an unsatisfactory manner. The charge was flatly denied by Mr. De Waal and by his son, and under the circumstances we are of opinion that the charge must be held not proved. The other charge was frankly abandoned by Mr. Innes. Therefore, upon the personal charges we must find in favour of Mr. De Waal. The next class of cases we have to consider are the charges made against persons alleged to be agents of Mr. De Waal. These persons are J. F. Stadler, G. C. Hauptfleisch, Tielman de Waal, Frederick Newman, Adrian Jacobus de Waal, Arend Laurence, sen., Pieter de Waal, and Jan Brits. Of these, Hauptfleisch and Newman were alleged to be paid agents for De Waal, but no evidence was given in support of this allegation, which was denied by the respondent and by his witnesses. As to Brits, no evidence was offered to show his agency, so that he may be dismissed from further consideration; as may also Laurence, who was the agent of Mr. Bosman, if of any one, to whom and to Mr. Krige he gave his votes. No corrupt practices having been proved against the sitting member, the question of agency, and the effect of the acts of these agents before, during, and after the election become the most important matters we have to consider as regards the respondent. Remembering whence our Parliamentary institutions are derived, we are, I think, justified in seeking the aid and guidance of English authorities, especially when we find that the definitions of corrupt practices in our local Acts have been taken almost verbatim from the English Statutes. I regret not having had access to the original reports cited, and especially to *O'Malley and Hardcastle's Reports*, and am forced to rely mainly on quotations from them contained in the text-books. As to what constitutes agency, it is stated in *Rogers on the Law of Elections* (Pt. 2, c. 16), cited by Mr. Innes, and with which I fully agree, that "it is obvious that the principles of legal agency, derived as they are from the transactions of private life, cannot be applied with strictness to cases of electioneering agency. A candidate at an election professedly seeks an office of trust for the benefit of the public; the public, therefore, is the party mainly interested, nor is it too much to require that in seeking to obtain such an office, the candidate should employ trustworthy agents and become responsible for their conduct. Besides, it is not to be expected that any express directions to bribe, treat, or unduly influence electors, or any distinct recognition of such acts if done—such as would be required in an ordinary inquiry before a court of law—could ever be brought home to candidates; and probably in practice such conduct hardly ever occurs." And again, "It is to conceal agency, and so to relieve the candidate from the consequences of corruption practised on his behalf, that the efforts of unscrupulous men engaged in the conduct of an election have been generally directed." This authority goes on to show that the Parliamentary liability of a candidate is governed by different principles to those to be applied when the question is one of liability to penalties at law. But I am at one with the learned counsel for the respondent, in his contention that the fact of agency is not to be presumed but must be established. An agent is something more then a supporter of a candidate or a mere volunteer. As was said in the Londonderry case (I cite from *Rogers*), no supporter of a candidate who chooses to ask others for their votes, and to make speeches in his favour, can force himself upon the candidate as an agent, nor should a candidate be held responsible for the acts of one from whom he actually endeavours to dissociate himself. But the proof of agency must necessarily be various. As so able a judge as Mr. Justice Blackburn, in the Bridgwater case, observed: "It has never yet been distinctly and precisely defined what degree of evidence is required to establish such a relation between the sitting member and the person guilty of corruption as should constitute agency. No one yet has been able to go further than to say as to some cases, enough has been established; as to others, enough has not been established to vacate the seat." And in another case the same learned Judge said: "I think all one can do is this, to say that wherever a person is in any way allowed by a candidate, or has the candidate's sanction, to try to carry on his election, and to act for him, that is some evidence to show that he is agent." In the Aylesbury case,

Mr. Justice Field said: "I have come to the conclusion that any person whom the candidate puts in his place to do a portion of his task, namely, to procure his election as a member of Parliament, is a person for whose acts he would be responsible." Mr. Justice Grove thus expressed himself: "I am of opinion that to establish agency, he must be proved, either by himself or his authorised agent, to have employed the persons whose conduct is impugned to act on his behalf, or to have to some extent put himself in their hands, or to have made common cause with them, for the purpose of promoting his election. To what extent such relation may be sufficient to fix the candidate must, it seems to me, be a question of degree." Now our Act No. 9, 1883, section 37, certainly does impose a penalty on any agent or sub-agent who represents himself or professes to be authorised to act as the agent of the candidate without written authority, but it nowhere lays down that only such person as have such written authority are to be recognised on an election petition as the candidate's agents. In the case of *Ross* v. *Neethling*, where this Court unseated the sitting member on one charge of undue influence being proved to have been committed by his agent (Louw), it would seem that the agent in question had no written authority. The case is not reported, but on reference to the records I find that Mr. Neethling stated, "none of the persons mentioned in the petition had any power from me." The first of these persons named in the petition was the agent in question. According to the newspaper report of that case, the learned Chief Justice said: "It was perfectly clear to him that Mr. Louw was the agent of Mr. Neethling. He was satisfied that at the meeting at which members of the committee were appointed Mr. Louw was nominated by Mr. Neethling as one of his agents, and he was satisfied that Mr. Neethling knew that Mr. Louw was actively canvassing for him. He admitted that he would not have prevented Mr. Louw from acting for him; and that as his son-in-law Mr. Louw was actively engaged for him. He would therefore be responsible for any illegal acts committed by the agent in question." This is quite in accordance with English cases, where canvassing, being a member of committee, and any active participation in the election with the approval, tacit or otherwise, of the candidate have been accepted as evidences of agency. In short, it is a question of fact for the Court as jurors to determine from all the circumstances whether agency has been established or not. As *Rogers* states (p. 819), "It is considered sufficient if the fact of agency be established by circumstances arising out of the general features of the case, the conduct or connection of the parties, the subsequent recognition of the acts of the supposed agent, or at least the absence of any disavowal of such acts. And it is usually proved by inference from a variety of facts, each of which, taken singly, may not furnish any conclusive or even material evidence against the party accused, but the aggregate of which combine to establish to the satisfaction of the judges the connection between the candidate and the alleged agent." The English cases further show that when the fact of general agency is established the candidate is responsible, in a Parliamentary sense, for all the acts of the agent; and though the authority of the principal be only proved to have extended to legal acts yet he will be held responsible for illegal acts done by such agents, though expressly contrary to his instructions. Applying, as I think we ought, these general principles to this case, as jurors we come to the conclusion that agency has been established as regards Messrs. Stadler, Hauptfleisch, Newman, and Adrian de Waal. As to Tielman de Waal and Pieter de Waal, though I think agency has been established, as no corrupt practice has been brought home to them, they may be dismissed from further consideration. No written authority was given to Stadler, but his agency is not denied, Mr. De Waal himself stating that he left matters in the town of Stellenbosch mainly in Stadler's hands. Mr. De Waal also considered Hauptfleisch as representing him in the town, and Hauptfleisch had worked for Mr. De Waal at the previous election. As to Newman, he seems to have worked under Stadler. Before the election Stadler told Mr. De Waal that Newman was working for him and he raised no objection. Newman took a very active part in canvassing and in bringing voters to the poll. Adrian de Waal and Pieter de Waal were both relatives of the candidate and the latter held his written authority to represent him at the polling. Adrian de Waal was requested by the candidate personally to see fair play at Kuil's River, and acted there for his brother, though it is true he says he was more concerned to secure the return of Hofmeyr than of Mr. De Waal. Agency being established we now come to the consideration of what is meant by corrupt practices, which by section 2 of Act 9, 1883, include among other offences bribery and treating, as defined in Act No. 21, 1859. The definitions in section 1 of this later Act, are apparently copied from the Corrupt Practices Prevention Act, 87 and 18 Vic., c. 102. It will be necessary only to refer to the 1st sub-section of section 1 of Act No. 21, 1859, which is as follows:

"Every person who shall directly or indirectly, by himself or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure or endeavour to procure, any money or valuable consideration to or for any voter, or to or for any other person, in order to induce any voter to vote, or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election," shall be deemed guilty of bribery. It is contended by Mr. Schreiner on this section that to render a candidate liable for any act done after the election, it is necessary to prove that it was done corruptly; and further, that as agency terminates with the election. though such corrupt practice may affect the votes on a scrutiny, it cannot disqualify the sitting member who is altogether ignorant of it, unless it is connected with some promise made or conduct of the agent previous to or during the election itself; in other words, to affect the return it must relate back to the act of the agent while still authorised and acting as such agent. We are inclined to admit the force of this contention in many cases. But here, again, whether the act was done "corruptly" or not is an inference to be drawn from all the facts. The word "corruptly" is also used in section 3 of Act No. 21, 1859, in the definition of treating, a definition also taken from the English Statute. In *Cooper* v. *Slade* (6 El. & Bl., 447), cited by Mr. Schreiner, Baron Alderson, in discussing this section, laid down that the word "corruptly" had a definite meaning, and remarked: "We agree that the purity or honesty of intention of the person is immaterial if he does the thing prohibited.' And in another case (*Rogers*, p. 784), Mr. Justice Blackburn is reported to have said, "As for the word 'corruptly,' it does not mean wickedly, or immorally, or dishonestly, or anything of that sort, but with the object and intention of doing that which the Legislature plainly means to forbid." Both these statements, taken as definitions, have been criticised, and I think fairly so, But we see no objection to the further remarks of Mr. Justice Blackburn when he said, "In fact giving meat or drink is treating when the person who gives it has an intention of treating, not otherwise; and in all cases where there is any evidence to show that meat or drink has been given, it is a question of fact for the judge whether the intention is made out by the evidence, which in every individual case must stand upon its own grounds; and although each individual case may be a mere feather's weight in itself, and so small that one would not act upon it, yet if there is a large number of such cases, a large number of slight cases will together make a strong one, and consequently it must always be a very important inquiry, what was the scale, the amount, the extent to which it was done?" Again, the same learned judge says: "The statute does not say it shall depend upon the amount of drink. The smallest quantity given with the intention will void the election. But when we are considering as a matter of fact the evidence, we must, as a matter of common sense, see on what scale and to what extent it was done." As already stated, the agency of Messrs. Stadler. Hauptfleisch, Adrian de Waal, and Newman has been established. Against the first three named bribery is charged, against Newman both bribery and treating. Of the five counts against Stadler only the third requires notice, the others being either not proceeded with or not proved. In the third particular Stadler is accused of having given a voter named Adrian Robyn the sum of 2s. 6d., pursuant to a previous arrangement, on account of the said voter having voted for Hofmeyr and De Waal, and refrained from voting for Krige. Robyn was called in support of the accusation, and I must say that in our opinion he was one of the most unreliable witnesses examined during the hearing. We would at once have found the charge not proved, but for the admission by Stadler that he had given this man 2s. 6d. after the election. Considering Stadler's explanation as to how the money came to be given, coupled with the facts that there had been no previous communication between Robyn and Stadler, and that as soon as Stadler heard that Hauptfleisch had not sent Robyn to him he accused Robyn to Attorney J. H. Walker of having obtained the money under false pretences, we hesitate to find it proved that the 2s. 6d. was given by Stadler in consideration of Robyn's vote. Stadler's conduct is not above suspicion, but I am not prepared, on the evidence, further to condemn him. Next, as to Hauptfleisch, numerous cases of bribery have not only been clearly proved, but were admitted by him. The evidence certainly goes to show that the bribes were paid after the voting, to some on the polling day, to others on the following morning, and to others even a week or more after the election. Some voters who did not call for their money he stopped in the street and paid. There was certainly an amount of openness in the procedure, but as the money was paid as a reward for the votes cast for his principal, we consider ourselves justified, under all the circumstances, in holding the payments to have been made corruptly within the meaning of the Act. Moreover, we are of opinion that in some of the cases the communication between Hauptfleisch and

the voter before the election was of such a nature as to hold out a prospect of reward, and the subsequent payment was but the complement of the former inducement. That being so, the candidate in whose interest he acted must take the consequences. Next on the list stands Frederick Newman. With Mr. De Waal's knowledge he had worked as a canvasser before the election under Stadler, and on the day of the polling he was very active in looking up the coloured voters, and taking them to the poll. It is clear also that he made promises to voters to induce them to vote for Mr. De Waal, and that he extensively treated those who did so vote. He, too, says he worked at his own cost, but applying the principles already laid down, as he was Mr. De Waal's agent, Mr. De Waal must suffer. The evidence led in support of the charges, not only those contained in the petition but as well as those in the reply, have overwhelmingly established the fact that corrupt practices extensively prevailed at the last election, especially among the coloured voters. One glaring case of bribery by Newman of a respectable-looking European, named Langeveld, who seemed to glory in his shame, was also brought home. Langeveld's only explanation of his conduct was that knowing money was going he was determined to get as much as he could for his vote. Lastly comes the case of Adrian de Waal. As stated, we find him to be an agent for his brother. On the day of polling he gave the two Dumas, who voted for Messrs. Hofmeyr and De Waal, each 2s. 6d. with which to buy some meat. Adrian de Waal said he did so out of pure generosity, and because the voters were poor men who could not afford to lose their time. But in one case, at all events, there was a promise of a leg of mutton made to the voter's wife before the voter went to record his vote. It is clear that the money would not have been given but for the votes, and here, too, we must hold that there was in fact a corrupt practice. In our opinion any one of the charges proved would vacate the seat, but taking them together, it is beyond dispute that the only course open is for the Court to declare the election of Mr. De Waal null and void as prayed in the petition. In support of the second prayer of the petition claiming the seat, Mr. Krige relies upon having a majority of votes after deducting those disqualified. But as the respondent has availed himself of the provisions of section 43 of Act 9, 1883, by bringing counter-charges of a similar nature to those contained in the petition, and as the proof of such charges would afford a good answer to Mr. Krige's claim, it is useless counting votes until we see whether the counter-charges can be disposed of. These counter-charges, like those in the petition, affect the candidate personally, as well as his alleged agents. Taking the view we do of the evidence, it is unnecessary for me to review at any length the grounds why we hold that agency has been established between the candidate Mr. Krige and his sons Jacobus and Louis, his son-in-law Louw, J. J. Carinus, and P. Pietersen. Mr. H. J. Geeringh, too, was one of the persons appointed in writing as his representative by Mr. Krige, but no evidence has been given in support of any charge against him. I need not take up time in discussing the charges affecting Messrs. Carinus, Louw, and Louis Krige. It will be sufficient to say that they have been disproved. But as to Pietersen, corrupt practices have been clearly shown. Pietersen asserted that he was only "standing treat" at his own cost to his usual customers as was his wont on such festivals as the Queen's Birthday, and moreover, that he only gave away beer which had turned sour and which he could not sell. But it was proved that it was only to the voters who stated they had supported Mr. Krige that any drink was supplied, that it was largely supplied, and apparently to any voter that came, that other liquor besides beer was given, that sound beer was given, and that Pietersen's usual customers who had not voted for Mr. Krige were charged for their liquor. We cannot attach weight to Pietersen's evidence in the face of the many contradictions it has received. We have come to the conclusion that his treating was corruptly done, in that it was intended to and must have influenced voters in casting their votes. Indeed, counsel has attempted not so much to clear Pietersen as to rely upon the want of connection between him and the candidate. Mr. Schreiner, who evidently was more at ease in condemning the treating by Pietersen than he was in excusing the similar charge against Newman, strongly contended that the treating was so general that, on the authority of English and Irish cases, it was sufficient, without more, to have voided Mr. Krige's election had he been returned. I again regret that I am not able to refer to the cases cited in *Cunningham on Elections* in support of this contention, refered to by Mr. Schreiner; and as at present advised we are not prepared to adopt this view to the full extent to which it has been pressed. The text writers to whom we have been referred lay down that when an election is voided for general treating, it is by virtue of the common law. Until we have better authority on the point we would prefer to consider a general or organised system of treating as evidence of participation therein, or cognisance or tacit

approval thereof, by the candidate, and in such case we would be satisfied with slight evidence to establish agency. I have no doubt that the object of Pietersen's treating so extensively as he did was to influence the voting; and that it was pretty generally known among the coloured people that anyone who would support Mr. Krige could have drink gratis at Pietersen's canteen. When added to this we have the fact that Pietersen had signed Mr. Krige's requisition, and was to Mr. Krige's knowledge a pledged supporter, that Pietersen had in one instance at least canvassed for votes, that there were frequent communications between Pietersen and the candidate, that the canteen was directly opposite Mr. Krige's house, and that a crowd of voters congregated there during the polling-day and must have been seen by Mr. Krige, that these voters had as a rule voted for Mr. Krige, and that no objection was raised by Krige against what was going on, I have no hesitation in finding that agency, in a Parliamentary sense, did exist. The least that Mr. Krige could have done would have been to show some disapproval of Pietersen's conduct, and to have expressly dissociated himself from his too active supporter. At any rate, he cannot complain of a failure to discover what was being publicly practised in his interest in his immediate vicinity should under the circumstances be mistaken for a concurrence therein. Stellenbosch is not a large place, and the evidence shows that what was done by one party or the other in the town was speedily bruited aboard. We should willingly have stopped at this point, and held Mr. Krige not entitled to the seat, but that the 8th section of Act No. 9, 1883, imposes the duty on the Court of reporting to the Governor whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate "and the nature of such corrupt practice." A charge of bribery has also been made, and we must say whether or not this has been proved. The gravity of the charge was felt by counsel, and it was warmly pressed home on the one side, and earnestly combated on the other. We have most carefully weighed every argument which has been urged in his favour, and it is with sincere regret that I state that we have been forced to the conclusion that it is our duty to report that corrupt practices have been proved to have been committed by Mr. Krige in the matter of Kamaldien Ras, as well as in the matter of the treating of voters by Pietersen. We are as much influenced in coming to this conclusion by the admissions made by Mr. Krige himself as by the evidence given by Ras. Ras, a mason by trade, had formerly been employed by the candidate, for whom he had voted at the previous election. For some time past, however, Mr. Krige had employed another workman, Ras being now more or less of an invalid. In September was the last communication between Ras and Mr. Krige until the approach of the election. About a fortnight before the election, Mr. Krige sent a present of about half a pound of snuff to Ras, with a message that when he wanted more, he could have further supplies. Ras did send, and received presents of snuff, as he said, on six or seven occasions up to about a fortnight after the election. Mr. Krige states he personally remembers only three such occasions, but the messenger sent stated he sometimes got the snuff from Jacobus Krige. Ras says that before the election, the candidate's son Jacobus Krige asked him to vote for his father, when Ras replied, "Yes, if you pay me. I don't vote for people any longer without payment." The son asked, "What's your price?" and Ras replied, "I would vote for my day's wages, ten shillings." Jacobus Krige then said, "We will settle that after voting." Jacobus Krige denies this conversation *in toto*, but he weakened the effect of his denial by his exaggeration as to Ras's habits and conduct. I have no doubt that a conversation took place which induced Ras to vote for Mr. Krige in the hope of further reward. After the election Mr. Krige sent 2s. to Ras, which he indignantly returned as insufficient, and not the wages he had stipulated for. Mr. Krige admits sending the 2s., but says it was because a request for a loan for 5s. had been made by Ras a few days before and refused by him. Ras denies having made any such request. Jacobus Krige, in support of his father, states that Ras had first asked him for a loan of 5s., and that he had refused it, and that on the following day, when Ras came to see his father, Ras was rolling drunk. Jacobus Krige gave Ras the character of being a most dissipated man, and said he was in the canteen from morning to night. Seeing the witness in the box, and watching his demeanour, and seeing how he sustained cross-examination by able counsel without being shaken in his evidence, and without sufficient suggestion why a "canteen loafer," as he was called, should refuse a gift of 2s. because he had previously asked for a loan of 5s., we cannot, as we were asked to do, throw over his testimony altogether. Mr. Krige states that he acted from philanthropic motives, not corrupt ones. But if we find that gifts were made, a vote asked for, and a promise of payment made before the election, and after the election money was sent, I think this is one of those instances of doing that which the law seeks to prevent, as would re-

quire more cogent evidence than was given in this case before we could find the motive not to be corrupt. True, the promise of reward was made by Jacobus Krige, but his agency was established. He was living with his father, and canvassed and worked actively for him to his knowledge, and the whole of the circumstances lead us to believe he was such an agent as the law contemplates. In our opinion Mr Jacobus D. Krige, as well as his father, has been guilty of corrupt practices. The remaining charge against the candidate in connection with the voter Theron we consider has failed. There were negotiations for support, but nothing amounting to bribery in return for such support has been proved. I mentioned at the commencement of this judgment three classes of persons affected by the inquiry. I have dealt with two classes, and there only remains the third class, namely, the voters who were bribed and treated. Section 2, of Act 21, 1859, makes voters receiving payment for their votes guilty of bribery. As we are required to report all persons guilty of any corrupt practice, it will be necessary to specify those voters in our report. In accordance with what I have already stated, we shall certify to His Excellency the Governor (*a*) that the respondent Pieter de Waal is not entitled to be declared duly elected as one of the members for the electoral division of Stellenbosch; (*b*) that no other person is entitled to be declared duly elected in his place; (*c*) that corrupt practices, namely, bribery and treating, have been proved to have been committed by and with the knowledge and consent of the candidate, Willem Adolph Krige; (*d*) that corrupt practices extensively prevailed at the recent election for the said electoral division; (*e*) that the following persons, agents for the candidates, have been guilty of corrupt practices, namely Gabriel C. Hauptfleisch, Adrian de Waal, Jacob Daniel Krige, of bribery; Frederick Newman, of bribery and treating; and Philip Pietersen of treating; (*f*) and that a number of voters, who will be specified in our report, have been found guilty of corrupt practices. Lastly, as to costs. The petitioner is entitled to the costs of petition and the respondent to the costs of the answer, except as to the charges made which have failed. As both parties, however, have succeeded on the main issues, but have failed in details, we are of opinion that the fairest course to both parties will be to order that each party bear his own costs. The cost of preparing the notes of evidence must be divided in the same proportion. But one duty remains, and it is the only pleasant one connected with this inquiry. I must express our appreciation of the very fair and candid manner in which the case has been conducted on both sides, as indeed was only to be expected from the eminent counsel engaged; and also to acknowledge the great assistanee rendered to the Court by the able arguments of counsel both as to the law and to the facts.

Mr. Justice Upington: The judgment which has just been given expresses fully my view upon every question. It has been the subject of full consideration between his lordship and myself, therefore it is not necessary that I should add anything. I can only regret that the evidence in this case should have disclosed such a want of appreciation of the exercise of the franchise as has been shown.

[Petitioner's Attorney, G. Montgomery Walker; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

THE INSOLVENT ESTATE OF WOOD BROTHERS. { 1894. June 6th.

Mr. Webber, on behalf of the trustee, applied for an extension of time until August 31 for the final administration of the estate. The estate was placed under compulsory sequestration on October 12, 1893, and the petitioner was appointed sole trustee on November 23. The only available assets were a few movables, which had been sold for £35.

The Court granted the application.

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

Re SECRETAN'S INSOLVENT ESTATE. { 1894. June 7th. „ 12th.

Insolvency—Provisional trustee with power to carry on business—Application for appointment before final decree.

Where before the final adjudication application was made for the appointment of a

provisional trustee in an insolvent estate to carry on the insolvent's business, that of a bottle-store keeper, the Court refused the application but referred the matter to the Master to appoint a curator bonis.

This was an application by the creditors of Secretan's insolvent estate for the appointment of a provisional trustee to carry on the business of the insolvent.

The estate consisted of wines, spirits and such like, the insolvent being a bottle-store keeper.

It was alleged that it would be greatly to the benefit of the estate that the business should be carried on without interruption, and that if the premises were closed until the appointment of a permanent trustee great loss would be occasioned thereby to the creditors.

Mr. George William Steytler was suggested as being a fit and proper person to carry on the business.

The provisional order placing the estate under compulsory sequestration was granted on the 5th instant.

Mr. Molteno was heard in support of the application.

The Acting Chief Justice: Is a provisional trustee ever appointed before the final order of sequestration has been granted?

Mr. Molteno cited *re* S. J. Mostert, jun.* (5 Searle, 309).

The Court refused the application.

The Acting Chief Justice said: The Court invariably refuses to appoint a provisional trustee before the final order of sequestration has been granted. The application will be refused but the matter will be referred to the Master, who has authority under the Insolvent Ordinance to appoint a *curator bonis*.

On 12th June the final order was granted and Mr. Steytler appointed provisional trustee.

[Applicant's Attorneys, Messrs. J. C. Berrangé & Son.]

* See *Ex parte Sheard; Re Kuper's Estate* (3 Sheil, 474).—*Ed.*

SUPREME COURT.

[Before Mr. Justice BUCHANAN, Acting (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte DUXBURY. { 1894. June 12th.

Mr. Schreiner, Q.C., applied for the admission of Mr. W. S. Duxbury, of the Inner Temple, as an advocate.

Mr. Duxbury,, took the oath, and was duly admitted.

PROVISIONAL CASES.

COLONIAL ORPHAN CHAMBER V. KUBLER.

Mr. Tredgold applied for provisional sentence on a mortgage bond for £1,000 with interest, less £45 19s. paid on account.

Granted; the property declared executable.

FRENCH, VENTURNT AND CO. V. SIMON.

Mr. Molteno applied for the final adjudication of defendant's estate.

Granted.

STANDARD BANK V. MEYER.

Mr. Innes applied for provisional sentence on three promissory notes for £115, £105, and £75, less £55 paid on account.

Granted.

GERD'S EXECUTORS V. WHITE.

Mr. Jones moved for provisional sentence on a mortgage bond for £250.

The Court made the order; the property was declared executable.

COLLECTOR OF CUSTOMS V. SPENCE AND OTHERS.

Mr. Giddy applied for the condemnation of certain goods and the payment of a penalty of £160.

Granted.

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted rehabilitation: Wm. Anderson, Isidore Hirsch, and J. M. C. Horn.

GENERAL MOTIONS.

STEWART V. ST. MARY'S CONVENT, WYNBERG.

Mr. Buchanan asked the Court to make absolute the rule *nisi* for delivery into the custody of her father the petitioner and his minor daughter Kathleen Murrill Mary Stewart.

The Court made the rule absolute, but awarded no costs.

THE PETITION OF PETER VAN HEERDEN.

Mr. Maskew applied for authority to the Registrar of Deeds to register certain antenuptial contract entered into between Johannes M. L. van Heerden and Sophia du Plessis on 4th May, 1891, the same having been mislaid and not presented within the time required by law.

Granted; the notary to pay the costs.

PAARL FRUIT PRESERVING COMPANY.

Mr. Schreiner, Q.C., presented the first report of the official liquidators.

The Court made the usual order as to publication.

IN THE MATTER OF THE MINOR LODEWYK J. WENTZEL.

Mr. McLachlan asked for leave to raise a sum of money on mortgage on certain piece of ground situate in Jordaan-street, Cape Town, registered in the name of the minor and his father, for the purpose of building a house thereon, the land being at present vacant.

The Court made the order.

The Court adjourned till this morning.

WATERMEYER AND VAN DER MERWE v. WEGE. 1894. June 13th. " 14th. " 15th. " 18th. " 19th. " 21st.

Election petition—Bribery—Undue influence—Agency.

This was a petition presented by the applicants against the election of the respondent, one of the sitting members for Clanwilliam.

The petition was in the following terms:

The petition of Egidius Benedictus Watermeyer and Francois Johannes van der Merwe, of Calvinia,

Humbly sheweth:

1. That on the 16th day of February, 1894, an election was holden of members to represent the Electoral Division of Clanwilliam in the House of Assembly of this colony, when Dirk Jacobus Albertus van Zyl, Pieter Gerhardus Wege, and your petitioners were candidates for the representation of the said division.

2. After due taking of the poll in manner provided by law, it has been declared by Proclamation of His Excellency the Officer Administering the Government of this Colony, dated the 8th day of March, 1894, that the said Dirk Jacobus Albertus van Zyl and Pieter Gerhardus Wege have been elected as members of the said House of Assembly for the Electoral Division of Clanwilliam aforesaid.

3. Your petitioners state that corrupt practices were committed at the said election by the said P. G. Wege, and his agents, for the purpose of securing the election of the said Wege, and the said Wege did offer money and other valuable considerations and engage in other corrupt and illegal practices to induce certain persons, being voters, to vote for him, the said Wege, and to refrain from voting for some of the other of the said candidates, and did otherwise interfere with the free exercise of the franchise by such persons, in contravention of the provisions of sections 1 and 4 of the Corrupt Practices Act, 1859, as will more fully appear from the schedule of particulars marked "A," which your petitioners have annexed to this petition.

That by reason of the premises and by virtue of the 36th and 38th sections of the Parliamentary Election Act, 1883, your petitioners pray that the election of the said P. G. Wege may be declared void.

[Then followed Schedule "A" referred to in the petition.—*Rep.*]

The respondent filed the following reply:

1 Respondent admits the allegations in paragraphs 1 and 2 of the petition.

2 The respondent denies the allegations in paragraphs 3and 4 of the petition and in the Schedule annexed thereto.

Wherefore the respondent prays that the petition may be dismissed with costs.

Mr. Rose-Innes, Q.C., and Mr. Searle, Q.C., appeared for the petitioners.

Mr. Schreiner, Q.C., and Mr. Graham for the respondent.

The material points in the evidence and argument appear from the judgment.

The Court dismissed the petition.

Mr. Justice Buchanan, the Acting Chief Justice, in giving judgment, said: This election petition differs from the one lately tried in this Court, in that only a few charges have been scheduled, and there is no claim to the seat made by either of the petitioners. The petition avers that at the last election of members of the House of Assembly for the division of Clanwilliam, Messrs. Van Zyl and Wege were declared elected, and that corrupt practices were committed at the said election by the said Wege and his agents, in contravention of the provisions of sections 1 and 4 of the Corrupt Practices Act of 1859—the sections defining bribery and undue influence—wherefore the petitioners pray that the election of the said Wege may be declared void. Though not

set forth in the petition, it appears that at the recent election there were four candidates for the two seats, who polled as follows: Mr. Van Zyl, 840 votes; Mr. Wege. 679 votes; Mr. Van der Merwe, 588 votes; and Mr. Watermeyer. 508 votes. The schedule of particulars annexed to the petition contains nine counts. Of these the last has not been proceeded with. Of the remaining eight, six are alleged against Mr. Wege personally, and two against his alleged agent. J. A. L. van der Merwe. In the charges for determination there is no accusation of treating, no charge of actual bribery, and no vote alleged to have been gained by the sitting member, except in the case of Gous. The state of the poll was therefore not affected by respondent's acts; and there is nothing either alleged or proved to show that corrupt practices extensively prevailed at the election to which the petition relates. What is complained of is attempts to bribe, and attempts to intimidate voters. Our law as to bribery was so recently discussed that it is not necessary now to enlarge thereon. As to undue influence, the definition in our Act is divided into three principal heads, namely, the use of open force or violence, or the threat thereof; the infliction of any injury, or the threat thereof; and duress or fraudulent device. It is the second part of the definition with which we are concerned in this case. The actual words of the section in question are: "Every person who shall directly or indirectly inflict, or threaten the infliction, by himself, or by or through any other person, of any injury, damage, or harm, or loss, or in any other manner practise intimidation upon or against any person, in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, shall be deemed to have committed the offence of undue influence." This, like the definition of bribery, is taken from the English Statute, 17 and 18 Vic., c. 102. The English definition has been replaced by section 2 of 46 and 47 Vic., c. 51, but the only material change has been the introduction of the words referring to "spiritual" as well as temporal injury, not contained in our Act, and the omission of the words, "or in any other manner practise intimidation." Practically, there is very little difference between the definitions. There is always a difficulty in drawing the line between legitimate and illegitimate influence, and to say exactly where one leaves off and the other commences. "The law cannot strike at the existence of influence," remarked Mr. Justice Willes in the *Lichfield Case* (1 O'M. and H., 25), "it is the abuse of influence with which the law can deal." The most common cause of complaint in England is on account of pressure used by employers, landlords, and the like; a cause not nearly so appreciable in our circumstances. But where such undue influence is clearly shown to have been exercised, it will with us, as certainly as in England, avoid an election, as was shown in the case of *Ross* v. *Neethling*, tried in this court in 1884. In determining on the fact whether or not the influence has been undue, the relation of the parties must have an important bearing, as must also the nature of any alleged threat and the species of undue influence used. As the object of the law is to ensure a free election, the actual result and whether or not the threat is carried into execution are elements to be considered; but mere want of success is not conclusive, for the object of the law is to prevent any intimidation being practised with the object of affecting the voting. Considering in order the charges made against respondent personally, the first particular alleges that the said Wege, about a week before the election, promised a voter named Willem Wouter Jacobus van der Merwe, a share in the Blandford Company of which he alleged he was managing director, if the said voter would vote for him, and further, that the said Wege endeavoured to intimidate the said voter by saying that he, Wege, had certain promissory notes of the said Van der Merwe, which he could get him in trouble with regard to if he did not vote for Wege. As a fact, this voter did not support Wege, but voted for petitioners. At the interview which took place between Wege and Van der Merwe, the latter deposed that no one was present. Mr. Van Dyk, who in our opinion was a witness fully deserving credit, positively asserts he was in the room with the other two, and must have been so to Van der Merwe's knowledge. He supports Wege in his denial that any promise or attempt at intimidation was made, and flatly contradicts Van der Merwe on the matter of the beer, about which there could be no mistake. There is in this case a direct conflict of testimony. But as it is shown that Wege was not connected with the Brandford Company, and had in the public prints given notice of this fact some months before the election; that he was not the managing director of that company, and had never accepted such a position, and that the only promissory note ever given by Van der Merwe to Wege was given many years ago for expenses incurred in obtaining Van der Merwe's rehabilitation; that such note had been paid off by instalments, and that no money dealings had taken place between the parties since 1888; and as Van der Merwe's testimony is unsupported, while Wege is cor-

roborated by a reliable witness, we have no hesitation in holding that this charge has been disproved. The second particular alleges that a voter named Klein, who occupied certain premises belonging to Wege, was promised the lease of the premises for a longer period if he would vote for Wege, and that if he did not vote for him he would work against him detrimentally in respect of any application of his which would come before the Licensing Court; and further threatened to take him into the Supreme Court to have a certain contract of lease between them cancelled because the said voter refused to vote for him (Wege). Klein voted for the petitioners, one of whom was a member of the Licensing Board of which Board Wege was not a member. The evidence showed that Wege was annoyed at Klein going against him, and that there were interviews, at which he solicited Klein's support: but we incline to the opinion that Wege would not have objected to Klein voting for the petitioners if only he had ceased actively to work for Wege's opponents. There had been previous complaints made by Wege against Klein for not complying with the terms of his lease as to effecting repairs, and the threat of going to the Supreme Court had relation thereto. But after seeing the parties, it borders on the ludicrous to suggest that it was in the power of Wege to intimidate a person of Klein's temperament; and, as counsel put it, both parties looked brimful of fight and excitement. Most of the interviews were sought by Klein, whose conduct better suited the character of an aggressor than that of an abashed or deterred dependant; and he displayed quite as much eagerness for any contest as could have been shown by Wege. He seemed to pride himself on being a man not easily frightened. Certainly no threat was acted on, and what passed between the parties may best be described as angry words not meaning anything. As to the proposal to renew the lease, it was to be on fresh terms as to repairs to which Klein would not agree, and cannot be held to amount to an attempt to bribe. This charge must therefore be held also to have failed. The third charge is that the said Wege offered payment to one Gous about a week before the election if he would vote for Wege. This was the only voter named in any of the counts who said he voted for Wege. But after hearing his evidence and learning how Gous acted towards his own side the petitioners' counsel felt constrained to abandon this charge, independently altogether of the denial given to it by Wege. Gous is not a witness to whose evidence, under the circumstances, we can attach credit. The fourth charge is that about the 3rd October, 1898, Wege offered to lease 1,000 sheep at a rental of 6d. a sheep per annum to a voter named Visagie if he would vote for Wege at the approaching election. This charge was as positively denied by Wege as it was deposed to by Visagie. The price paid by Visagie for other sheep hired by him at that time was 9d. and 1s. per head. Visagie voted for the petitioners, not for Wege. Visagie had sold certain land to one Schalk van der Merwe, who had in turn resold to Wege, and there were errors in both transfers which Wege was seeking to have rectified; and at one of the interviews on this subject, when the alleged attempt to bribe was stated to have been made, Schalk van der Merwe was on the stoep outside the room in which Visagie and Wege were. Schalk van der Merwe overheard part of the conversation, but heard nothing of the alleged attempt at bribery. This, however, is not conclusive one way or other. As a fact Wege had no sheep to let, and never had possessed any. Visagie had bought ground from the petitioner Van der Merwe, and was still owing him the purchase price, and paying him interest thereon. A good deal was made in cross-examination of a letter written by Wege from Cape Town in October to Visagie, in which Wege says: "If you can assist my election again this time, I shall gladly do you a favour in return." This letter is not made the foundation of any specific charge, but is used only to support the credibility of Visagie. But there is one part of Visagie's evidence which has not been satisfactorily explained. Visagie said Wege produced a parcel of papers, and said: "There are £5,000 worth of bills, among them is a bill of yours for £300. If you vote for me I will give it to you some time after the election." This must mean either that the £300 was due, and Wege offered that for a vote, or that the bill was not owing, and that Visagie was therefore entitled to its return. Although the first count charged that something similar to this had passed between Wege and one Van der Merwe, and it was there relied on as an attempt to bribe, still no reliance is placed upon this offer in Visagie's case, or any charge founded upon it, although the amount was so much larger than in Van der Merwe's case. As a fact, Wege had, ever since he gave up business, been returning old bills and title deeds and papers to his former clients, and on this occasion actually returned two notes for small amounts to Visagie. Mr. Wege produced his books in court, and from the extract put in it appears there never was any such bill transaction between them or anything approaching thereto, and that all liabilities of Visagie's had been finally liquidated in Sep-

tember, 1888, four years before this conversation. At most what can be said is, that there is oath against oath, and under the circumstances we cannot hold the charge proved. The fifth charge is that Wege promised one Du Toit free lodgings in Cape Town, should he bring his wife to town for treatment, if he would vote for Wege. It appears that months before the election Du Toit told Wege of his wife's illness, and that the doctor advised his taking her to Cape Town for treatment, but that he was too poor to do so. Wege thereupon drew up a subscription list and headed it, to which list the petitioner Watermeyer also contributed. Wege said if Du Toit would write to him when he was coming to town he (Wege) would assist him to get his wife treated gratis at the hospital, where poor patients were admitted free. Wege denies that anything was said about free lodgings for Du Toit also, and we are not satisfied that there was any such promise. As a fact Du Toit voted for the petitioners and not for Wege. In our opinion there was no attempt at bribery here. The eighth and last charge against Wege personally is a peculiar one. It reads as follows: "Baron Farmer and J. N. A. Farmer, registered voters, were invited to meet Mr. Wege at Calvinia, to discuss certain promises which the respondent had made regarding Loriesfontein to the benefit of the Bastards. On the 9th February, 1894, the said voters met the said Wege in the house of Mr. J. G. Osler, the only persons then present being Wege, Osler, and the two voters, when Wege promised that if the Bastards would vote for him he would arrange that all their troubles with Loeriesfontein should be settled by him at once, and promised to send a wire at once to Sir Gordon Sprigg to this effect: "Have come to a decision, give Bastards free and unlimited title;" but thereafter when the said voters declined to vote for him, Wege said if they did not they would be sorry for it, and he would do his best to harm them still further in Loeriesfontein matters." Mr. Innes, though severe in his strictures on the impertinence of a candidate presuming to send any such telegram as was alleged to any Minister, was forced to admit that the evidence did not bear out any part of this charge except the last sentence. No promises regarding Loeriesfontein were shown to have been made, and no telegram was actually sent. Mr. Wege had for some years been engaged on certain Government Commissions which had investigated the question of granting titles to the Bastards at Loeriesfontein, and the attitude taken up by him was not approved of by the section of which the two Farmers were representatives. Mr. Wege had discussed the matter with Mr. Osler, who had been acting as agent for the Bastards, and they had agreed that it would be advisable to have no restrictions in the titles to be issued. This had been the view consistently held by Wege all through the matter. The Government apparently had at first resolved to issue titles with a restriction against alienation for ten years, but in January titles had been prepared and signed by the Governor with this restriction erased. These titles reached Clanwilliam, and were seen by Wege after the consultation with Osler and before the interview with the two Farmers. Now the view taken by Wege was diametrically opposed to the wishes of the Bastards, who desired a sort of communal title without power of alienation, and a reversion in favour of the community generally. There was no inducement, therefore, in the proposed telegram, but the contrary. Baron Farmer states that he and his brother distinctly told Wege they would not vote for him, as he had been opposed to their wishes all along, and that Wege had then said, "If you won't vote for me I will still have the majority of the votes all the same. What would you think if I came in? I will be able to do much mischief in your case then." Baron Farmer said he replied, "No, it is too late for you to do me any mischief now." This was the case, for the titles had already been issued. It was suggested that there were some further questions relative to Loeriesfontein ground still unsettled. But assuming this to be what passed, though it is but fair to Mr. Wege to mention that he says that what he intended to convey was that he would not trouble himself further in this matter, yet this was something very different from the threat charged, viz., "to do his best to harm them still further on Loeriesfontein matters." On this charge also, we therefore find against the petitioners. This disposes of all the charges affecting the respondent personally. There remains only the sixth and seventh counts, which refer to one and the same occasion. They charge that one J. P. L. van der Merwe—the family of Van der Merwe is a very numerous one in the Clanwilliam district—an agent of Wege's, offered two coloured voters, named Louw, a quantity of grain and chaff if they would go to Tontelboschkolk, a voting place five hours distant from their residence, and vote for Wege. Several questions are involved in this charge, first as to the date of this conversation, secondly as to the relationship existing at the time between respondent and J. A. L. van der Merwe, and lastly, the nature of the conversation. It was evident several times during the hearing that the statements of witnesses as given in the box

could not have been laid before the legal advisers of petitioners before the schedule of charges was drawn up and filed by them. The preparing and working up of the case showed the hand of other than that of a professional man. The discrepancies are unfortunate, but I would not hold them fatal if it had been proved that the sitting member had broken the law in the manner alleged in the charges. He may not have conducted this contest on lines which a candidate of the highest principle and a delicate sense of honour would have chosen, but that is not a ground for avoiding his election. His past career has also been inquired into, but that again is a matter for the constituency to consider, except only so far as it affects his credibility. The evidence shows that the division of Calvinia was dominated by the political organisation known as the Afrikander Bond. At a meeting of delegates of the Bond held for the purpose, Messrs. Van Zyl and Wege were nominated as the representatives of the party. The nomination was objected to as having been irregularly made, and an appeal was taken to the revising or central committee of the Bond. The appeal not being sustained, there resulted a split between the members of the Bond, and hence this contest. The majority seem to have supported the nomination of the delegates, but both sections actively supported their respective candidates. Mr. J. Nel van der Merwe was one of the most prominent leaders of the old party, and exerted himself to secure the return of old members. Mr. J. Nel van der Merwe told Wege he did not want any payment or anything from him, and Wege was content to leave himself in Mr. J. Nel van der Merwe's hands. On the 20th January—the polling taking place on the 16th February—Mr. Wege and his colleague met about fifty of their supporters, and then a resolution was passed that Mr. J. Nel van der Merwe should be the man to appoint agents at the polling places. One of the sub-agents so appointed by Mr. J. Nel van der Merwe was his brother-in-law, J. A. L. van der Merwe nicknamed "Jacob Slagter," being the Van der Merwe mentioned in the schedule. The character of this sub-agent is certainly not of the best, he having been placed under ban by the Resident Magistrate for six months for intemperance. He, too, had worked actively for the nominees of his section of the Bond and had canvassed for Messrs. Van Zyl and Wege for some months before the election with Mr. J. Nel van der Merwe's knowledge and concurrence, though not apparently with that of Mr. Wege. When the conversation between "Jacob Slagter" and the Louws took place is not clear, the Louws speaking at one time of two weeks after the New Year and at another of two weeks before the election, Van der Merwe fixing it in the November previous; but at any rate, if it was after the polling places were named, it probably was before the appointment of Van der Merwe as sub-agent to appear at one of the polling places on behalf of Wege. Now, though the canvassing, the active interest taken in the election, the attending meetings and speaking in favour of the sitting members, no doubt primarily those because they were the nominees of the political association of which he was a member, would not necessarily show more than that this man Van der Merwe was what might be termed a mere volunteer, yet when afterwards the candidate, through his principal agent, with the knowledge how such volunteer had been engaged, chose to appoint him as a sub-agent, the Court may well infer a ratification or adoption of the previous conduct, so as to make the candidate responsible therefor. This, however, is the utmost to which in this direction the doctrine of constructive agency in a Parliamentary sense ought we think to be carried. At the same time where the act complained of is unknown to the candidate care must be taken in applying the principle of ratification. This appears to me an instance in which the remarks of Mr. Justice Blackburn, one of the most practical and able English judges, made in the *Hereford Case* (1 O'M. and H., 195), are especially in point. He said: "As you go lower down you require more distinctly to show that the act was done by a person whom the candidate would be responsible for. As you come higher up, it is more as if the candidate had done it himself." And again in the *Hastings Case* (1 O'M. and H., 236): "If a small thing is done by the head agent, that would upset the election; and if small things were done to a great extent by a subordinate person, comparatively slight evidence would probably induce me to find that he was an agent. But when you come to a single case, to make that single case upset the election would require considerable evidence of agency." In adopting this language we in no way depart from the principle that the candidate is liable for the acts of his agent, whether principal or sub-agent, when it is clear that the relationship of agency exists. If there was agency, and if there was a corrupt practice within the meaning of the Act, the sitting member must be unseated, even though all the other charges failed, and hard as it may be that he should suffer for a transaction about which he was totally ignorant. It is necessary then to consider what actually occurred. According to Christian Louw, the first of the witnesses examined on this charge

it appears that on the occasion in question Van der Merwe had outspanned at Zandwerf, the farm of the petitioner Van der Merwe, where the Louws resided. A conversation ensued as to the election; Louw continues: "He then asked for whom we were going to vote. I told him we were going to vote for Mr. Watermeyer and Mr. Van der Merwe. Then Mr. Van der Merwe said we must come down to Tontelboschkolk, where he would treat us in such a manner as we have never been treated before if we would vote for Wege and Van Zyl. If we went to Tontelboschkolk he would give us as much chaff and corn as we could put on the cart. He went away after that." These voters were living on ground hired by them from the petitioner Van der Merwe, for whom and for Mr. Watermeyer they actually voted. The suggestion made was that they would not be free to vote against their landlord if they voted at the polling-station nearest his house; while by going this distance they would be free from his control, and that if the Louws were not subjected to restraint, their inclination would be to vote for the old members. A third brother who was then on the same farm, and to whom it is not suggested that any offer was made, did vote for the respondent. It was suggested that all that was intended was to provide food for the horses while there and on the return journey, and not to give any consideration for the vote. We do not think that it was understood by the Louws that any very valuable produce would ever be supplied. The Louws had known Van der Merwe for a long time, and were well acquainted with his character, and even if the conversation took place, I can well understand why no notice was taken of it. Whatever was said on this occasion, as well as on the other occasions mentioned by witnesses who have been examined as to communications with Van der Merwe, can best be described as being a braggart's vapourings, Although there may be ground for suspicion regarding Van der Merwe's conduct, we are of opinion, under all the circumstances of the case, that we are not justified on this charge alone in certifying that the respondent was not duly elected. After the most mature deliberation we have to declare that the petitioners have failed in their petition, and they must pay the costs of this inquiry.

Mr. Justice Upington: I fully concur. The only cases which presented any difficulty to my mind were the cases of Visagie and Van der Merwe. In Visagie's case, he being, as was pointed out by Mr. Innes, a respectable-looking man, I was bound to attach credit to what he stated until I discovered that there was any flaw in his testimony, His evidence is that early in October Mr. Wege promised him as a bribe the hire of 1,000 sheep at 6d. per head for a year. Now Mr. Visagie was an intelligent man, as Mr. Innes also stated. He was very active on behalf of the dissentient section of the Bond, as represented by the petitioners, and I should have thought when, as he himself stated, he had no confidence whatever in Mr. Wege that as soon as this offer had been made to him of a distinct bribe he would at once have proceeded to put himself in communication with the section of the Bond he represented, because then he held Wege's fate in the hollow of his hand. But nothing was done, and under these circumstances, if Mr. Visagie was a man of such high morality as we are asked to believe, I cannot imagine why he did not expose publicly such a deliberate attempt to corrupt a leading man like that in the exercise of the franchise. Under these circumstances, there being oath against oath, I do not feel at liberty to credit the testimony of Visagie. In the case of Van der Merwe, I fully adopt everything that has been said by his lordship as to his position. I think, looking at all the circumstances in the case, that no Court would be justified on the evidence in unseating Mr. Wege.

[Petitioners' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. S. J. Mostert and Van Zyl & Buissinné.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. WILLEM WENTZEL. { 1894. June 18th.

Police-constable—Misconduct — Dismissal—Resident Magistrate—Ordinance 25 of 1847.

A Resident Magistrate has no authority, under Ordinance 25 of 1847, to dismiss from the force a police constable who has been guilty of misconduct.

The proper course to be adopted in such cases is laid down in section 6 of the Ordinance.

This case came on review from the Resident Magistrate of Springbokfontein, Namaqualand, before Mr. Justice Upington.

The accused, a police-constable, was charged with contravening section 7 of Ordinance 25 of 1847.

He was found guilty and sentenced to pay a fine of £10, or to undergo one month's imprisonment with hard labour, *and to be dismissed from the Police Force subject to the approval of His Excellency the Governor.*

Mr. Justice Upington referred to the case in court, and having read section 6 of the Ordinance, said that the Magistrate had no power to dismiss the prisoner.

Mr. Giddy for the Crown: The usual course adopted is that prescribed by section 6 of the Ordinance.

The Acting Chief Justice said: The Magistrate took upon himself the power of the Governor. These things should be done according to law. I have no doubt that now the charge against the prisoner has been brought to the notice of the Government, they will make proper enquiries, and if necessary will dismiss him. The words after "hard labour" must be expunged; the rest of the sentence, of course, will stand.

Re ROTHKUGEL. | 1894. June 19th.

Extradition—Warrant—*Prima-facie* evidence. *Where there was sufficient* prima-facie *evidence, in the opinion of the Law Officers of the Crown, to justify the issue of a warrant for the arrest of a person charged with theft in the South African Republic, and the alleged thief was arrested in the Colony and detained in gaol pending his extradition, The Court refused on the petition of the prisoner to order his discharge from custody, although the person, on whose affidavit the warrant was issued, alleged in a subsequent affidavit that possibly he had only a civil action against the prisoner.*

This was an application on notice to the Attorney-General that he would be required to show cause to-day why the prayer of the applicant, Michael Rothkugel, should not be granted.

The affidavit of the petitioner (Rothkugel) showed that on the 30th of May, 1894, he was arrested at Wonderboom, district of Richmond, on a telegram from the Public Prosecutor, Johannesburg, stating that a warrant had been issued for the arrest of Michael Rothkugel on a charge of theft by means of embezzlement. He was thereupon lodged in the gaol at Richmond, where he still was. On June 2 he was brought before the Resident Magistrate at Richmond and re-committed to gaol. From the date of committal up to now no further evidence or proof had been submitted to the Magistrate of the alleged crime except what was set forth in the telegram. That was the only statement submitted to the Magistrate by the authorities of the South African Republic.

The petitioner alleged that he had been informed that the application had been made by the Government of the South African Republic to His Excellency the Governor for the latter's warrant for petitioner's surrender to such person as might be authorised to receive him.

The petitioner submitted that he was entitled to be discharged from gaol, no evidence having been adduced or brought forward against him to prove that he had committed any crime or offence.

Morkel, an auctioneer, of Johannesburg, who made the affidavit upon which the warrant was issued accusing the petitioner of theft by means of embezzlement, in a subsequent affidavit alleged that it was possible that considering Rothkugel had for a number of years been his broker and executed many transactions for him, they being on very amicable terms with each other, and that he (Morkel) had on one or other occasions, after Rothkugel had purchased or sold shares, given him the proceeds thereof, or rather the amount for which he had to render an account, as a loan, it was possible he had only a civil action against him.

No notice of the present application had been given to the Resident Magistrate of Richmond.

Mr. Searle, Q.C., in support of the application: Before the petitioner can be extradited there must be proper evidence before the Magistrate to justify him in dealing with the matter.

Mr. Justice Upington: The authorities in the South African Republic have got to show that before he can be extradited.

Mr. Giddy, who appeared for the Crown, said the Governor's warrant had been issued, and was now at Richmond.

Mr. Justice Upington: And when a neighbouring State has asked for the extradition of this man, the witness on whose affidavit the warrant was issued comes forward and says, "I think I have made a mistake; I have only a civil cause of action."

Mr. Searle: There must be strong evidence to justify his detention.

The Acting Chief Justice: There must be sufficient evidence before the Magistrate.

Mr. Justice Upington: The usual course is this—I have had years of experience of it: an

application for extradition is made; the fact is telegraphed that a warrant has been issued. That is only for the time being. Then the warrant is transmitted with the affidavit on which it was granted, and upon that the Magistrate brings the prisoner before him, and says, "Upon this statement you are liable to be extradited."

Mr. Giddy said the Magistrate had evidence before him, and committed the man for trial.

Mr. Justice Upington: How can we possibly go behind that?

Mr. Searle submitted that there was sufficient irregularity before the Court to justify an order for the prisoner's discharge.

The Court refused the application.

The Acting Chief Justice said: The Magistrate must act according to law. The Magistrate, when he received a warrant from a State with whom we had an extradition treaty, must, after the arrest of the prisoner, see the affidavit upon which the warrant was issued, and if there was sufficient evidence before him to justify him in committing the prisoner for trial if the crime had been committed in the Colony the Magistrate will commit the accused to prison. If the crime with which he was charged was not included in the Extradition Act, or if there was not sufficient *prima-facie* evidence, the prisoner had a right to petition the Supreme Court for his release from custody. It is not shown in the present case that the evidence was not sufficient or that the crime with which the prisoner was charged was not included in the Extradition Act. The matter has been before the law officers of the Crown, who were thoroughly satisfied that the charge had been made out, and that there was a *prima-facie* case against the prisoner on which to issue the warrant. What is attempted to be set up in this case is really a defence to the prosecution. A further affidavit is produced from the person on whose information the prisoner was arrested, stating that he may have made a mistake. We cannot say that anything has been wrongly done, and no order can be made at the present stage. We certainly cannot try the case, and say whether the prisoner is guilty or not, and that is what the petitioner asks us to do.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

LOOCK V. KLUYTS. 1894. June 20th.

Mr. Searle, Q.C., for the plaintiff, moved for provisional sentence for £14 ona promissory note.

Mr. Innes, Q.C., for the defendant, opposed provisional sentence on the grounds that the note was given as the defendant's share of certain survey fees, but that as the plaintiff claimed 800 morgen of land in excess of what the defendant had sold him, the defendant refused to sign a power to pass transfer and denied liability on the note.

The plaintiff's proper course was to bring an action to compel transfer.

The Court granted provisional sentence as prayed.

The Acting Chief Justice said: The main objection taken as a defence in this case is that the plaintiff is splitting his demand against the defendant, but it has been frequently decided that a plaintiff can sue upon a liquid document like this without being defeated by the exception that there has been a splitting of demand. This promissory note must be considered independent of the dispute between the parties as to the extent of land sold and yet to be transferred. This promissory note was given in part payment of the expenses of the surveyor, who came on the 19th August and finished on the 26th. Defendant had not the money in his possession, and asked plaintiff to pay his part. The decision respecting the promissory note will not affect the dispute between the parties. It was money paid out of pocket which the defendant promised to pay, and which he would have paid if he had the money at the time. Under the circumstances we are bound to give provisional sentence as prayed.

FRANK AND CO. V. TEAGUE.

Mr. Molteno moved for provisional sentence for £48 2s. 6d. upon three dishonoured cheques.

The Court made the order as prayed.

IN THE MATTER OF THE MINOR J. J. N. COETZEE.

Mr. Shippard moved for authority to the executors of the estate of the minors Guthrie to pay out to petitioner certain funds arising out of the trust to enable him to proceed to Scotland to study for the medical profession.

The order was granted.

In re ANTE-NUPTIAL CONTRACT OF C. H. SPARKS.

Mr. Buchanan moved in the affidavit of J. D. Walker, Stellenbosch, for an order for the registration of the ante-nuptial contract between Charles H. Sparks and another. The contract had been mislaid, and had been forwarded a day late for registration.

The order was granted, subject to the rights of creditors. Costs to be paid by the notary.

IN THE INSOLVENT ESTATE OF J. S. REED.

Mr. Tredgold, on behalf of H. W. Pearson, one of the trustees, applied for an order authorising certain property in this estate to be conveyed to Reed, the insolvent, in accordance with a resolution of creditors.

Mr. Justice Buchanan said they could not authorise transfer, but they could authorise Mr. Pearson, to administrate the estate as if he were the sole surviving trustee.

IN THE INSOLVENT ESTATE OF F. C. W. MEWES. { 1894. June 20th.

Mr. Maskew moved to make absolute the rule *nisi* for payment to the insolvent's wife of half the surplus proceeds of his estate, and for an order that the interest on the balance be devoted towards the maintenance of the minor child of the parties.

Mr. Searle, Q.C., for the defence, read an affidavit from the defendant stating that he left his wife in full possession of all his property, with strict instructions to pay interest due at the rate of £22 10*s.* per year. The income from the property was £96. She failed to pay the interest, by reason of which the estate was sequestrated, and he was put to great expense and irreparable loss. It was by mere accident that he heard his estate had been sequestrated. He had been unfortunate in being unable to make money in Johannesburg owing to the fearful crisis and failures there. He was only able to make both ends meet. He was assistant in a butcher's shop, and earned £1 a week, which was hardly sufficient to support himself.

Mr. Maskew read an answering affidavit, which stated that the wife, after paying rent, taxes, and repairs, had only £17 per annum from the property. She had written telling him of her inability to pay interest, and asked him for assistance, but got no reply. She received no communication from him for two years. She wrote and informed him of the proceedings in connection with the sequestration.

After argument,

Mr. Justice Buchanan said the Master would not pay out the money pending a further order of the Court, the costs of both sides to be paid out of the fund.

IN THE INSOLVENT ESTATE OF BENJAMIN HALLAK.

Mr. Duxbury moved on the affidavit of William Tuck, a creditor in this estate, for an order authorising the Master to call a meeting of creditors for the purpose of electing a trustee.

The Court made the order as prayed.

MADOLO v. MUNKWA. { 1894. June 20th.

Adultery Damages — Collusion—Natives — Proclamation No. 140 of 1885.

Where a native's wife had committed adultery, and damages had been given against her paramour in an action brought by the husband in the Magistrate's Court, although there was no evidence as to whether the plaintiff and his wife were married before or after the Proclamation No. 140 *of* 1885.

The Court, on appeal, *refused to reverse the Magistrate's decision.*

The fact that the guilty spouse is living at her husband's kraal only raises a presumption of collusion which may be rebutted.

This was an appeal from a decision of the Resident Magistrate of Idutywa in an action in which the present respondent, plaintiff in the Court below, sued the appellant (defendant) for six head of cattle, or £18 their value, being for damages sustained in consequence of the defendant having committed adultery with the plaintiff's wife.

There was abundant evidence of the adultery. The guilty spouse and her lover were caught lying on the veld in the act of adultery by the husband and another witness. The wife in her evidence admitted the adultery and acknowledged that the defendant had been her sweetheart for five years. The defendant denied the adultery and tried to prove that he was not the man who was found lying on the veld with the plaintiff's wife. He further alleged that he was not on good terms with the plaintiff, who some time before had been fined a beast for seducing his sister.

No evidence was taken as to whether the plaintiff had married his wife before or after the Proclamation No. 140 of 1885, or as to whether he had more wives than one.

There was evidence to show that the plaintiff's wife was at the date of the trial living at her husband's kraal.

The Magistrate gave judgment for the plaintiff for three head of cattle with costs of suit.

The defendant now appealed.

Mr. Searle, Q.C., in support of the appeal, contended that there was strong *prima-facie* evidence of collusion, and that it was impossible to determine whether the decision was correct or not until evidence had been given on the following points:

1. Was the marriage before or after the Proclamation?

2. If after the Proclamation was the marriage registered?

3. Had the plaintiff more wives than one?

He urged that the case should be referred to the Magistrate for evidence on these points.

The following authorities were cited and discussed *Dantile* v. *M'Tirara* (2 Sheil, 336); *Biccard's Case* (2 Sheil, 353), and *Ngqobela* v. *Sihele* (3 Sheil, 467).

Mr. Graham for the respondent.

The Court dismissed the appeal.

The Acting Chief Justice said: Two questions have been raised in this case: first, whether there was sufficient evidence on the record to show that the plaintiff was married to the woman with whom he contended the defendant had committed adultery; and secondly, whether there was collusion between the husband and the wife. I must say that after the cases decided in this Court I consider it immaterial whether this marriage was before or after the proclamation. The Court has held that a marriage according to native law is valid. The plaintiff in this case deposed that he was married to his wife. The question of polygamy was not raised in the Court below, and in the absence of evidence we must presume that this is plaintiff's only wife. Assuming that there was a legal marriage, I quite admit Mr. Searle's contention that a husband could not trade on the unchastity of his wife, and if there was collusion between husband and wife, it would be a bar to the husband recovering. In this case an experienced Magistrate had had the matter before him. He came to the conclusion that there was no collusion, and he gave damages. These damages were not excessive. They were only half of what was claimed. In considering these cases we must look at the habits and customs of natives; they do not live together in the same manner as whites. The position of the native woman is that she is under a sort of tutelage, and the fact of the woman going back to her husband's kraal is only a presumption not conclusive evidence of collusion. There is no evidence from which we can deduce collusion, and the presumption of it raised by the fact of the return of the wife to the kraal has been rebutted by the evidence in the case. There has been a marriage, there has been adultery, and there has not been collusion. The Magistrate's decision will be upheld and the appeal dismissed with costs.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge & Arderne.].

GIBSON AND MORGAN V. MANLEY AND THE ALBERT LICENSING COURT.
KERR AND PINNOY V. MANLEY AND THE ALBERT LICENSING COURT.

1894.
June 21st.

Liquor licence—Local option—New licence—Memorial—Act 25 of 1891, section 13, sub-section 1, section 15, sub-section 1)—Licensing Court.

M. *applied for a new licence to carry on the business of a bottle store in the Municipality of Molteno and lodged a memorial in terms of Act* 25 *of* 1891, *section* 13, *sub-section* 1. *The memorial did not contain the signatures of a majority of voters registered in the Municipality for the election of members of the Divisional Council.*

The Licensing Court, acting bona fide, *and in ignorance that the Secretary of the Divisional Council had not complied with section* 15, *sub-section* 1, *of the Act, granted the licence.*

The Supreme Court, on motion, set aside the proceedings of the Licensing Court as being illegal and gave costs against M.

These two matters were heard together, both were applications on notice, the first that the respondents would be required to show cause why so much of the proceedings of the Licensing Court for the division of Albert, held at Burghersdorp, on the 7th and 20th days of March, 1894, as refer to the granting of a bottle licence for Erf No. 151, Smith-street, Molteno, to the first-named respondent should not be set aside, why the said licence should not be cancelled by reason of the respondent (Manley) not having complied with the provisions of sub-section 1 of section 13 of Act 25 of 1891, in that the memorial, lodged by him with the Resident Magistrate for the division of Albert, in terms of the said sub-section, was not signed by a majority of voters registered for the election of members of the Divisional Council of Albert, within the limits of the Municipality of Molteno,

as required by the said sub-section, and by reason of its being informal in other respects, and why the respondents should not be ordered to pay the costs of the application *de bonis propriis*, or why such other order should not be made in the premises as to the Court should seem meet.

The second application was for leave to the applicants to join as co-applicants in the first application.

The facts are these:

The applicants are two hotel-keepers carrying on business in Molteno.

At the sitting of the Licensing Court for the division of Albert, held at Burghersdorp on the 7th March, 1894, the first-named respondent applied for a new bottle licence entitling him to sell liquor on Erf 151, in Smith-street, within the limits of the Municipality of Molteno, and in support of such application there was filed a memorial with the Court.

The memorial had subscribed to it the names of 229 persons, and purported to have been signed by them as registered voters of Ward No. 6, or Bamboesberg, of the district of Albert.

Of the 229 persons who signed the memorial 7 only were voters registered for the election of members of the Divisional Council of Albert, in respect of property within the limits of the Municipality of Molteno.

Another memorial signed by fifty-three persons objecting to the granting of the licence to Manley was also lodged with the Licensing Court, seventeen out of fifty-three persons who signed it being registered as voters for the election of members of the Divisional Council of Albert in respect of property situate within the limits of the Municipality of Molteno.

The names of two of such voters appeared on both the memorials.

The sitting of the Licensing Court was adjourned until 20th March for the consideration, *inter alia*, of Manley's application, against which three members of the Court voted, five members were however in favour of the application and it was accordingly granted, and a licence was issued on 4th May.

There are only twenty-nine persons registered for the election of members of the Divisional Council of Albert in respect of property situate within the limits of the Municipality of Molteno.

The applicants contended that the granting of the licence to Manley was illegal, as he had not complied with the provisions of sub-section 1 of section 13 of Act 25 of 1891, in that the memorial required to be lodged in terms of the sub-section was not signed by a majority of the voters registered for the election of members of the Divisional Council of Albert within the limits of the Municipality of Molteno.

The Secretary of the Divisional Council alleged that at the time of the making of the last voters' roll for the division of Albert in 1892, he was unaware of the provisions of Act 25 of 1891, section 15 and, thus did not group together the names of all those voters who are registered on the said roll within the area which falls within the limits of the Municipality of Molteno.

That he first became aware of the provisions of section 15, Act 25 of 1891, after the commencement of the present proceedings, and was never informed either by the Licensing Court for the division of Albert or by anyone else of the duties to be performed by him under the said section, and hence his omission to comply with the provisions of the section.

The Civil Commissioner's senior clerk, who presided at the first meeting of the Licensing Court in the absence of the C.C. and R.M., deposed that he examined the list of names approving of the issue of a bottle-store licence to Manley, and compared it with the list of Divisional Council voters furnished by the Secretary of the Divisional Council for the division of Albert.

That according to the list furnished to him there were 164 voters in the ward in which the town of Molteno is situated, of which number twenty had left, as shown in a declaration filed by Manley, leaving 144 voters in the ward.

That upon examining Manley's memorial deponent found the names of eighty registered voters of the ward, and that thus it appeared that Manley had complied with the provisions of the sub-section.

That no objection was taken to the legality of the memorial at the first or at the adjourned meeting.

The respondent Manley in his affidavit alleged *inter alia* that between the 20th March and the 4th May he went to considerable expense in building and making alterations in respect of the licensed premises with the full knowledge of the applicants, and further, purchased a considerable quantity of liquor which was stocked in the premises, and paid the sum of £30 for the licence, and on the 4th May opened the premises for the public, of all which the applicants were well aware.

That he had all along been under the *bona-fide* belief that his licence had been legally and properly granted.

That on the 5th May the applicant made the affidavits upon which the present application was founded.

That the first intimation he received of the intention of the applicants to object to the licence was on the 10th May, 1894, when notice of the application in the present proceedings was served upon him, and after he had incurred all the expense and outlay aforesaid.

That all the facts founded upon by the applicants as disclosed in their affidavits were within their knowledge previous to the said outlay and expense having been incurred, and that had they brought the same to his notice he would not have taken out the licence nor incurred any other expense or outlay in connection therewith.

Mr. Schreiner, Q.C., in support of the application: It is clear that the law has been broken and that the proceedings at the Licensing Court, so far as regarded the granting of Manley's application, were grossly irregular.

No defence has been raised, there is merely an appeal *ad misericordiam*.

The costs should be born by Manley, but if given against the Licensing Court they should be paid *de bonis propriis* (see section 30 of 25 of 1891).

The applicants had no other remedy, they were obliged to come to the Court. A refusal of the order will lead to a year's breach of the law.

The Attorney-General, for the respondents: The Licensing Court and Manley were both deceived by the voters' roll, which must be regarded as conclusive.

The Court cannot now frame a new roll.

The Court granted the application.

The Acting Chief Justice said: This application brings under discussion the principle of local option which was introduced by Act 25 of 1891. The respondent Manley applied for a licence in the town of Molteno, he not having held a licence before. Section 13 of the Act enacts that it shall not be lawful for the Licensing Court to grant a new licence unless there shall be lodged with the Resident Magistrate of the district at least four days before the meeting of the Licensing Court to consider the application a memorial signed by a majority of voters registered for the election of members of the Divisional Council, the Municipality, or where the Municipality is divided into wards the ward or district of the Municipality, or the place where the Village Management Act of 1881 is in operation, in which district, Municipality, ward, or place the premises proposed to be licensed are situated, approving of the issue of the said licence. I read the section as meaning that when a new licence is applied for the applicant must produce a memorial signed by a majority of voters for the district of the Divisional Council in which the new premises are situated; where it is a Municipality, he must produce a memorial signed by a majority of voters for the Municipality, and if the Municipality is divided into wards the memorial must be signed by a majority of voters in the ward for that Municipality. The secretary of the Divisional Council is required to make out a list, grouping together all the voters within the ward, district, or Municipality, as the case might be. In this case the secretary of the Divisional Council did not comply with the law, and did not group together the voters on the list. A memorial was sent in, and the Licensing Board not having any grouped list seems to have acted on the list of voters for the district of the Divi-ional Council. It is not necessary for the Court now to analyse the list, and see how many ought to have been registered within the Municipality, and how many in the ward, for the lists show that the applicant had not presented a memorial signed by the majority of voters within the Municipality. On the voters' list there were 164 voters. The memorial was signed by only eighty voters, which was not a majority of voters on the list. The Acting Magistrate went behind the voters' list, and received a certificate that twenty voters had left the district; and he said that eighty of those remaining were sufficient to constitute the necessary majority. Here he was altogether wrong. The Magistrate should have taken the list as he found it, and had no authority to revise it and strike off any of the names on it. The onus lay on the respondent to prove that he had a majority, and unless he had a majority it was out of the power of the Licensing Court to grant him a licence. He had not obtained the consent of a majority of the voters, and consequently the Licensing Court had no power under the Act to grant the licence, and the proceedings of the Court must therefore be set aside. The application will therefore be granted with costs against Manley. No costs will be given against the Licensing Court, who acted *bona fide*. The members of a public body in the exercise of their judicial functions should not be cast personally in costs under these circumstances. There was no necessity for the intervention of Kerr and Pinnoy. The costs against Manley will not include the costs of the intervention, which the applicants themselves must pay.

Mr. Justice Upington concurred.

[Applicant's Attorney, G. Montgomery-Walker; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

DU TOIT AND DE WAAL v. GREEFF'S ESTATE. | 1894. June 26th. July 3rd.

Execution—Suicide of execution debtor—Insolvency.

Du Toit and Co., on the 25th May, 1894, obtained judgment in the Supreme Court against G., and on 28th May they issued a writ of execution.

On 2nd June, certain of G.'s movables were attached by the Sheriff to satisfy the judgment.

On 5th June, G. gave notice of his intention to surrender his estate as insolvent and intimated that his schedules would be filed at the office of the Resident Magistrate, Queen's Town, on the 6th June.

The schedules were not filed, but a petition by certain of Greeff's creditors for the compulsory sequestration of his estate was signed and the affidavit sworn to on the 11th June, and whilst the papers were in transit to Cape Town (on the 12th June) G. committed suicide.

On the 14th June, an application by other judgment creditors of G., who had not issued writs, was made to a Judge in Chambers for the compulsory sequestration of G.'s estate.

The learned judge being made aware of G.'s suicide, referred the application to the full Court.

On the 15th June, the application was renewed in Court and refused.

On the 20th June, an application was made to the Court by creditors of G., other than Du Toit & Co., for an interdict restraining the Sheriff from parting with the proceeds of the sale of the goods attached.

The Court ordered the goods to be sold, but directed the Sheriff not to pay out the proceeds until further order.

G. left a will under which he appointed his wife executrix testamentary but she did not take out letters of administration.

On the 26th June, after the sale of the goods attached, Du Toit & Co. *applied to the Court to have the proceeds of the sale paid to them.*

Held, *following* Van Reenen v. Pearson (1 Ros., 236), *that* Du Toit and Co. *were entitled to the proceeds of the sale in satisfaction of their judgment.*

This was an application on notice to the High Sheriff and Master of the Supreme Court and to the Cape Town attorney of certain creditors of Greeff's estate calling upon them to show cause why the Court should not authorise the High Sheriff to pay to the applicants or their attorneys the proceeds of the sale of the stock and goods attached to satisfy their judgment.

The facts are these:

On 25th May, 1894, the applicants obtained judgment in the Supreme Court against Greeff for £283 18s. 6d. and costs.

On 28th May, they issued a writ against Greeff and on 2nd June the Deputy Sheriff of Queen's Town attached certain live-stock and goods valued at about £240 to satisfy the judgment.

On 2nd June, a writ was issued against Greeff out of the Eastern Districts Court for the sum of £185 11s. 9d. at the instance of one Smit in a judgment obtained by him on 15th May.

On 7th June, the Deputy Sheriff of Queen's Town attached certain sheep to satisfy this writ. These sheep had been previously attached about 16th April, by order of the Eastern Districts Court, to abide the result of an action to be brought by Smit.

On 5th June, Greeff gave notice of his intention to surrender his estate as insolvent and intimated that his schedules would be filed at the office of the Resident Magistrate of Queen's Town on the 6th June. These schedules were not filed.

A petition was signed by certain of Greeff's creditors and the affidavit sworn to on 11th June, and whilst the papers were in transit to Cape Town (on 12th June) Greeff committed suicide.

An application for the compulsory sequestration of Greeff's estate was made by other creditors of Greeff to one of the judges in Chambers on 14th June, but the learned judge, having been made aware of Greeff's suicide, referred the petition to the full Court.

On 15th June, the application was renewed in Court and refused.

Greeff was living when the judgments mentioned above were obtained, and the attachment of his stock and goods made, and was well aware of all the proceedings taken.

From the petition to sequestrate Greeff's estate it appeared that as far back as 17th May, one of his creditors (Heydenrych) had obtained a judgment against him in the R.M.'s Court of Queen's Town for the sum of £52 4s. 7d., and that this judgment had not been satisfied,

and that a judgment for £28 1s. 0d. had been obtained against him by one Schneider and had not been satisfied.

A promissory note made by Greeff in favour of Price Bros. for £60 10s. 0d. fell due on the 3rd May, and was dishonoured on presentation.

On 20th June last an *ex parte* application was made to the Supreme Court by Price Bros., Heydenrych, and other creditors without notice to the present applicants, for an interdict restraining the Sheriff from parting with the proceeds of the sale of the stock and goods attached.

The Court ordered the sale to be held, but directed the Sheriff not to pay out the proceeds until further order, after notice to all interested.

The petitioners alleged that the sale in execution was to take place to-day (26th June) and the proceeds would be immediately sent to the High Sheriff, and that they (the petitioners) would suffer loss if they were not allowed to receive the proceeds of the sale in satisfaction of their claim.

That no executor had as yet been appointed to Greeff's estate, and that they believed he had died intestate.*

The prayer was for an order authorising the Sheriff to pay the petitioners the proceeds of the sale of the stock and goods attached to satisfy their judgment.

Mr. Schreiner, Q.C., in support of the application, relied on *Van Reenen* v. *Pearson* (1 R. 236.)

Mr. Buchanan, for certain creditors: *Van Reenen* v. *Pearson* does not apply, as there was no insolvency in that case. There is a *casus omissus* in the Ordinance, no provision being made for a case of this kind. The estate vests in the Master and he should surrender it for the benefit of all the creditors. He referred to Ordinance 104, section 31. Ordinance 6 of 1843, section 22, and Act 38 of 1884, section 2.

Curia ad vult.

Postea (July 3rd).

The Court delivered judgment.

The Acting Chief Justice said: Several judgments were obtained in his lifetime against the late Mr. Greeff, of Queen's Town. The applicants, who were among the judgment creditors, sued out writs of execution, and certain movables were attached thereunder by the Sheriff. The respondents, some of whom were also judgment creditors, instead of taking out writs, forwarded a petition, supported by sufficient affidavits, for the compulsory sequestration of Greeff's estate. When this petition came before the judge of the week, he referred the application to the Court, as information was given him that Greeff had committed suicide while the petition was in transit. As no executor had been been appointed, or other person clothed with the *persona* of the estate, upon whom a summons for compulsory sequestration could be served, the Court, having regard to the 31st section of Ordinance No. 104, refused the application as premature. At respondents' request, however, the Court, in the interest of all concerned, authorised the Sheriff to sell the property in his hands and to hold the proceeds pending further order, after notice had been given to all interested. Applicants now ask, after notice to respondents, for the benefit of their writs, and to have the proceeds paid over to them. The 31st section of the Ordinance No. 104 enacts that it shall not be lawful for any person who shall have obtained the judgment of any court against any deceased person in his lifetime, or against his executor in any suit commenced against such executor, or which having been pending against the deceased, shall have been continued against his executor, to sue out or obtain any process in execution of such judgment before the expiration of the period specified in the previous section of the Ordinance during which the executor is calling for claims against the deceased. It further enacts that it shall not be lawful for any such person to sue out or obtain any process in execution of any such judgment as aforesaid within six months from the time when letters of administration shall have been granted without first obtaining an order of Court. For the applicants it is contended that this section does not affect them, as their writs were in the hands of the Sheriff, and the goods seized thereunder before the debtor's death. Now whatever may be said of the spirit and intention of this section, in terms it does not apply to the circumstances of this case. The application is certainly supported by the decision of the Supreme Court in *Van Reenen* v. *Pearson* (1 Roscoe, 236), where it was held, that when an execution creditor died after the seizure of his goods under a judgment of a Magistrate's Court, and the messenger subsequently sold the goods, that the sale was under such circumstances legal. In that case, after taking time to consider, Mr. Justice Cloete said: "The Court now has no hestitation in saying that the judgment of the Court below was properly carried out under the circumstances. The provisions of the Ordinance No. 104 do not apply to the present case, nor do the terms of the Insolvent Ordinance." "The officer of the Court, notwithstanding the death of the debtor,

* Greeff did not die intestate, he left a will under which his wife was appointed executrix testamentary.—*Rep.*

was bound to realise the goods on behalf of the triumphant party." Mr. Justice Watermeyer concurred in this decision. This is said to be an old case, but it does not seem ever to have been questioned, though naturally the instances to which it could be applied must be extremely rare. Following the previous ruling of the Court, unfortunate as it may be for the respondents, we are now bound to give the applicants the benefit of their superior legal position. It may be inequitable that one set of creditors should be stopped by statute from taking steps to protect themselves and be forced to stand by while another set of creditors are realising their claims in full out of an insolvent estate; but if an alteration of the law is desirable, recourse must be had to the Legislature. Reference to section 21 of Ordinance No. 104, however, shows that the creditors are not altogether without a remedy. If they can satisfy the Master that the estate of the deceased is manifestly insolvent, the Master is not to take steps for the appointment of an executor dative, but he is authorised and required to take the necessary proceedings for having the estate voluntarily surrendered. Up to the present the Master has not taken such proceedings. In the absence of sequestration the application must be granted. As to costs, as it was necessary to come to the Court, the respondents will pay costs of opposition only, applicants' other costs to come out of the estate.

Since the application was heard the Master has informed the Court that a will has been transmitted to his office, from which it appears that the surviving spouse is appointed executrix testamentary. That being so, she could at once have taken out letters of administration, and avoided the delay necessary for the appointment of an executor dative. The widow, however, does not seem inclined to apply for letters of administration.

Mr. Justice Upington concurred, and said: If the 13th section of Ordinance 104 had been taken advantage of, it is possible that the creditors, other than the execution creditor, might have obtained something from the estate.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Respondents' Attorney, John Ayliff.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

ADMISSION.

Ex parte MCLEOD. { 1894. June 26th.

Mr. Sheil moved for the admission of Mr. William James Macleod as a conveyancer.

Mr. McLeod took the oath, and was duly admitted.

GENERAL MOTIONS.

POTE V. PETERS.

This was an application on notice by the defendant for an order removing the trial of the suit between the parties from the Supreme Court to the next Circuit Court, to be held at Burgherdorp, on the ground that the witnesses reside in the district of Albert, and that costs would be saved by the removal.

The Attorney-General was heard in support of the application.

Mr. Sheil for the respondent.

The Court granted the application. Costs to be costs in the cause.

Re ADAMS, A MINOR. { 1894. June 26th.

This was an application for an order requiring he Resident Magistrate of Caledon to deliver up the said minor, a boy of weak intellect, to his mother and natural guardian, he having been removed from her care and custody without her consent.

There was also a prayer that the applicant might be allowed to proceed *in forma pauperis*.

Mr. Tredgold was heard in support of the application.

The Court directed notice to be served on the Attorney-General and on the Resident Magistrate of Caledon, and allowed the applicant, subject to counsel's certificate, to proceed *in forma pauperis*.

BOTHA AND LIND V. PRINS.

This was an application for the appointment of some person in the place of respondent to sign and execute all papers necessary to pass transfer to applicant Botha of landed property bought by him for the estate of the late Regina

Prins, respondent having failed to obey the order of this Court requiring him to sign such document.

Mr. Sheil for the applicants.

The Court granted a rule *nisi*, returnable 12th July, calling upon the respondent to show cause why he should not be attached for contempt of Court, and why some person should not be appointed to sign the necessary papers.

Service to be effected at the respondent's last known place of residence.

Re IRVINE, A MINOR.

This was an application for authority to the Master of the Supreme Court to pay out from money to the credit of the minor in the Guardians' Fund, certain sum already incurred in her maintenance and education, and for the allowance of an increased amount for similar purposes.

Mr. Watermeyer was heard in support of the application.

The Court granted the order in terms of the Master's report.

DUNKELSBUHLER V. LIQUIDATORS CAPE OF GOOD HOPE BANK. } 1894. June 26th.

Shares—Attachment—Discharge of order.

Where shares in a gold-mining company registered in the name of I., *who was domiciled in the South African Republic, had been attached to found jurisdiction in an action about to be instituted against* I., *and it afterwards appeared that the shares, although registered in the name of* I, *were really the property of* D. & Co. *for whom they had been acquired by* I. *as their agent, and* I *on ceasing to represent* D. & Co. *had handed the share scrip to* D. & Co.'s *new representative, who had received dividends on the shares on behalf of his principals, but the shares had not been transferred in the company's books in the name of* D. & Co. *because the company was in liquidation,*

The Court on the application of D. & Co. *discharged the order of attachment, but made no order as to costs.*

This was an application on notice for an order releasing from attachment *ad fundandam jurisdictionem* certain 6,980 shares in the Heidelberg Gold-mining Company attached in terms of an order of the Supreme Court dated 21st May, 1894, to found jurisdiction in an action about to be instituted by the liquidators against De Beers Consolidated Mines and one Imroth.

In the original application on which the writ of attachment issued it was alleged that the shares in question were the property of Imroth.

Mr. Bernhard Oppenheimer, the applicant's representative in this colony, filed an affidavit in which he alleged, *inter alia*, that the shares in question, although registered in Imroth's name, were the sole and absolute property of the applicant, and that Imroth had no right, title, or interest of any sort to the same or any part thereof.

That Imroth was, until May, 1893, the applicant's manager in Kimberley and Johannesburg, since which time the deponent has been the applicant's manager in Kimberley.

That since the month of November last, Imroth has had no connection of any sort with the applicant and his company, Mr. Adolf Wagner having succeeded him in Johannesburg.

That the shares were acquired during the years 1889 and 1890 by Imroth for and on behalf of the applicant and company, and that they all appear in their books, which could be produced, if necessary, as the applicant's property.

That the scrip of the shares was in the deponent's possession at the present time, and had been since first he became the applicant's agent, and that it was then and still held by him for and on behalf of the applicant solely.

That he had no connection with Imroth, and that in his capacity as the applicant's agent he had received the dividends payable on the shares attached and had paid the same to the credit of the applicant's account.

The Secretary of the company deposed that the first dividend was paid to shareholders on the 16th May, 1891. on which date a cheque representing the amount payable in respect of the shares was paid to Imroth, who, he was aware, was the applicant's representative in Kimberley, and that the second dividend was on 4th January, 1894, paid to Mr. Bernhard Oppenheimer, the present representative of the applicant and company, because he produced the scrip of the shares, and represented that he, as the agent of the applicant and company, was the proper person to receive the dividend.

Mr. Imroth filed an affidavit, in which he corroborated the statements made by Mr. Oppenheimer, and alleged that when he severed his connection with the applicant and his company he endorsed in blank all shares registered in his name, and handed the scrip for the same to the applicant's representative.

That all shares, with the exception of the shares in question, were transferred from his name several months ago to the names of the

applicant's new representatives, and that the reason why the Heidelberg Company's shares were not transferred was because the company was in liquidation, and the liquidation dividends are payable to the persons presenting the scrip certificate.

Mr. Schreiner, Q.C., in support of the application: A very natural mistake was made by the liquidators, occasioned by the shares being registered in the name of Imroth.

The principle laid down in *Harris* v. *Buissinné* (2 Menz., 105) cannot be extended to a case like the present. See *McGregor's Trustees* v. *Silberbauer* (9 Juta, 36).

The order should be discharged.

Mr. Sheil, for the respondents: Imroth being the registered holder of the shares, *prima facie* they are his property and remain such until they have been transferred, and inasmuch as they are, and were registered in his name on the date of the order of the 21st May last, that was sufficient to warrant attachment to found jurisdiction.

Registration is the test of ownership, and as regards the liability of the person in whose name the shares are registered, it makes no difference whether he has parted with the shares or not provided transfer has not been passed in the books of the company. See *Raubenheimer* v. *George Divisional Board* and *Massyn* (Buch., 1870, p. 61). See also Act 25 of 1892, section 961, sub-section 4).

In *McGregor's Case* the transaction was *bona fide*, but in the present case the circumstances are, to say the least, suspicious.

The Court granted the application.

The Acting Chief Justice said: The simple question for the Court to decide, is to whom do the shares belong? The liquidators of the Cape of Good Hope Bank instituted proceedings against Imroth, who was the registered owner of certain shares in the Heidelberg Gold-mining Company, and attached them for the purpose of founding jurisdiction. In gold mining-companies, not one-tenth of the holders of shares are registered The affidavits before the Court alleged that Dunkelsbhuler & Co., of whom Imroth was the agent, were the owners of the shares attached. In support of this allegation, there was the affidavit of Bernhard Oppenheimer, to the effect that the scrip had been produced by him to the liquidators of the company, and that dividends had been received thereon to him on behalf of the applicants. I think under these circumstances it would be going too far to say that the shares belonged to Imroth. In my opinion the shares must be released from attachment, but no order will be made as to costs, as the applicants are to blame for the mistake which the liquidators have made.

[Applicant's Attorney, Gus Trollip; Respondents' Attorneys, Messrs J. & H. Reid & Nephew.]

STEMMET V. THE TRUSTEES OF THE INDEPENDENT COMPANION SOCIETY. } 1894. June 26th.

Appeal—Delay in prosecuting.

On the 9th March, 1894, S. *obtained judgment in the Magistrate's Court of Cape Town against a Benefit Society, of which he was a member, for sick pay.*

On the 14th March an appeal was noted by the defendants, but they took no further steps.

Thereafter, on the 26th June following, S. *applied to the Court for an order barring the defendants from prosecuting the appeal.*

The defendants opposed the application and alleged that the delay in prosecuting the appeal was occasioned by the resignation of one of the trustees, and that in consequence the power could not be signed in time to bring the appeal in the Supreme Court term following the judgment, another trustee having to be appointed to fill the vacancy.

The Court ordered the appeal to be prosecuted within the seventh day of the next Supreme Court term. The costs to abide the result of the appeal.

This was an application on notice for an order debarring the respondents from prosecuting the appeal noted by them on the 14th March, 1894, against a judgment delivered by the Resident Magistrate of Cape Town, by reason of having delayed and neglected to proceed with the appeal within a reasonable time after such noting, and why they should not pay the costs of the application.

On 17th February last the applicant took proceedings against the respondents in the Resident Magistrate's Court of Cape Town in an action for the recovery of sick pay and wrongful dismissal from the service of the society. Judgment was given in his favour on the 9th March last for the sum of £1 12s. 6d. and costs of suit.

On the 14th March an appeal was noted by the respondents and the necessary sum deposited.

On the same date a writ was issued under security for recovery of the judgment, the amount of which was received by the applicant's attorney on the 11th April last.

The applicant alleged that from the noting of the appeal to the present date the respondents had done nothing to prosecute the appeal, and that he was debarred from making a final settlement of the matter by reason of the appeal being still pending and the security bond continuing operative against himself and his surety.

The prayer was that the respondents might be debarred from prosecuting the appeal, and that they should be ordered to pay the costs of the application.

The respondents' agent, in his answering affidavit to the above, alleged *inter alia* that the records in the Court below had been copied and everything done to proceed with the appeal, but owing to one of the original trustees having resigned his office, the power could not be signed in time to bring on the appeal last term, another trustee having to be appointed to fill the vacancy.

That the vacancy had now been filled, as would appear from the power filed 25th June, 1894, and the appeal set down for the first day of August next, notice of which had been given to the applicant's attorney.

That the applicant had not in any way suffered by the appeal not having been set down for last term, the costs having been paid without delay, and he being at the time of making his application well aware that the records had been copied, and that the respondents intended going on with the matter.

Notice of the present application was served on the 23rd June last, and notice of appeal set down for the 1st August was given yesterday, the 25th instant.

Mr. Sheil was heard in support of the application and relied upon *Rymer* v. *Solomon* (2 Sheil, 350).

Mr. Schreiner, Q.C., for the respondents.

The Court ordered the appeal to be prosecuted by the 7th August next, the costs of the present application to abide the result of the appeal.

[Applicant's Attorney, C. C. Silbarbauer; Respondent's Attorneys, Messrs. Du Preez & Walker.]

DIGEST OF CASES.

PAGE

Adultery—Divorce Damages.

Where a woman, who was living apart from her husband under a deed of separation, and there was no hope of reconciliation between the parties, had committed adultery,

The Court in an action for divorce by the husband refused to give damages against the co-defendant, a journeyman saddler, earning 5s. 6d. per diem.

Budd v. Budd and Freeman 170

2. —— Damages—Collusion—Natives—Proclamation No. 140 of 1885.

Where a native's wife had committed adultery, and damages had been given against her paramour in an action brought by the husband in the Magistrate's Court, although there was no evidence as to whether the plaintiff and his wife were married before or after the Proclamation No. 140 *of* 1885,

The Court, on appeal, *refused to reverse the Magistrate's decision.*

The fact that the guilty spouse is living at her husband's kraal only raises a presumption of collusion which may be rebutted.

Madolo v. Mumkwa 195

Animal diseases—Lung-sickness—Act 2 of 1881, section 8—Conviction under repealed section—Act 24 of 1886, section 129, sub-section 5—Neglecting and refusing to place infected cattle in quarantine.

Where a native living in the Transkei had been convicted under the 8th section of the repealed Act 2 *of* 1881, *there being no corresponding section in the repealing Act* 27 *of* 1893,

Held, *that the conviction was wrong.*

The mere refusal of a native to place infected cattle in quarantine when ordered to do so by his Headman does not amount to a contravention of Act 24 *of* 1886, *section* 129, *sub-section* 5.

Regina v. David Gwyl 144

Appeal—Delay in prosecuting.

On the 9th March, 1894, S. *obtained judgment in the Magistrate's Court of Cape Town against a Benefit Society, of which he was a member, for sick pay.*

On the 14th March an appeal was noted by the defendants, but they took no further steps.

Thereafter, on the 26th June following, S. *applied to the Court for an order barring the defendants from prosecuting the appeal.*

The defendants opposed the application and alleged that the delay in prosecuting the appeal was occasioned by the resignation of one of the trustees, and that in consequence the power could not be signed in time to bring the appeal in the Supreme Court term following the judgment, another trustee having to be appointed to fill the vacancy.

The Court ordered the appeal to be prosecuted within the seventh day of the next Supreme Court term. The costs to abide the result of the appeal.

Stemmet v. The Trustees of the Independent Companion Society ... 203

Architect — Unapproved plans and specifications—Quantities.

An architect is not entitled to any remuneration for preparing plans and specifications unless they are approved of and adopted by the person engaging him.

If however an architect is instructed to take out quantities he is entitled to fair remuneration for his work.

De Witt v. Cape Canning Company ... 116

PAGE

Articled clerk—Articles of clerkship—Non-registration — Rule of Court 212.

Where an articled clerk had served for over four years but his articles of clerkship for the first twenty-two months of this period had not, through an oversight, been registered in terms of Rule of Court 212, *the Court refused to admit him as an attorney until he had completed a full period of three years' service from the date of the registration of his articles.*

In re Brown (Buch. 1879, p. 73) *followed.*

Ex parte Kyd 153

Attachment *ad fundandam jurisdictionem* — Money — Liquidators Cape of Good Hope Bank v. De Beers Consolidated Mines (Limited) and Imroth 155

Auctioneer—Scope of authority—Conditions of sale.

S. & O. *were instructed by* V. *to sell certain erven for him.*

S. & O. *employed as auctioneer one of their clerks,* S., *who managed their business in the absence of the partners. The erven were sold subject to conditions of sale,* Clause 11 *of which provided that* purchasers should pay transfer duty, Government duty, auctioneer's commission, conditions of sale, *pro rata* share of advertisement, costs of survey and diagram, and transfer expenses.

Before the conditions of sale were signed S. *was asked what the expenses under* Clause 11 *would amount to, and without consulting* S. & O., *and without really knowing, said* not less than £5, but not more than £6.

W. *bought an erf at the sale and signed the conditions.*

The expenses under Clause 11 *of the conditions of sale amounted to* £9 3s. 5d.

In an action brought by S. & O. *in the Magistrate's Court to recover the* £9 3s. 5d. *from* W. *the latter tendered* £6 *and pleaded that it was agreed between the plaintiffs' qualified agent,* S., *and himself at the sale that the expenses under* Clause 11 *of the conditions would not exceed* £6.

Judgment was given for the plaintiffs for the amount claimed with costs, the Magistrate holding that S. *had not acted within the scope of his authority in stating that the expenses would not exceed* £6, *and that his statement to that effect was not binding on the plaintiffs.*

Held on appeal *from the Magistrate's decision that* S. *did not enter into a contract on behalf of* S. & O. *at the sale that the expenses would not exceed* £6.

Van Wyk v. Sauer and Orsmond ... 149

Contract—Breach—Medical attendance —Fees — Reasonableness — Molony v. The Colonial Government ... 166

Divisional Council—Bridge—Negligence —Damages—Non-liability.

Where a bridge situated on a divisional road had been so constructed as to permit of one vehicle only crossing at a time, and two vehicles travelling at night and coming in opposite directions, had attempted to cross the bridge at the same time, and one of the vehicles coming in contact with the railing, which had fallen into disrepair, was precipitated into the river bed, the horses being killed and the vehicle damaged,

Held, *in an action for damages by the owner of the horses and vehicle, that the Divisional Council was not liable, the uprights of the bridge being capable of bearing the ordinary traffic, and there being no evidence to show that the bridge had become unsafe for such traffic.*

Jordens v. Cape Divisional Council ... 174

Election Petition—Fixing day for trial —Security—Act 9 of 1883.

Where in connection with an election

PAGE

petition the security for costs provided for by Act 9 of 1883, section 4, sub-section 4, had been partially by recognizance, and the 21 days allowed the respondent by section 5 of the Act, within which he may object to the recognizance, had not elapsed, the Court refused to fix a day for the hearing of the petition.

Watermeyer and Van der Merwe v. Wege 135

2. ——Fresh charges—Practice.

An election petition should be framed ready for trial within the forty-two days referred to in Act 9 of 1883, section 4, sub-section 2.

If after the expiration of that period it is desired to bring forward fresh charges application shou d be made to the Court for leave to amend the petition.

Krige v. De Waal 136

3. —— "Bribery" — "Treating" — Agency—Krige v. De Waal ... 177

Watermeyer and Van der Merwe v. Wege 187

Execution—Suicide of execution debtor —Insolvency.

Du Toit & Co., *on the 25th May, 1894, obtained judgment in the Supreme Court against* G., *and on 28th May they issued a writ of execution.*

On 2nd June, certain of G.'s *movables were attached by the Sheriff to satisfy the judgment.*

On 5th June, G. *gave notice of his intention to surrender his estate as insolvent, and intimated that his schedules would be filed at the office of the Resident Magistrate, Queen's Town, on the 6th June.*

The schedules were not filed, but a petition by certain of Greeff's creditors for the compulsory sequestration of his estate was signed and the affidavit sworn to on the 11th June, and whilst the papers were in transit to Cape Town (on the 12th June) G. *committed suicide.*

On the 14th June, an application by other judgment creditors of G., *who had not issued writs, was made to a Judge in Chambers for the compulsory sequestration of* G.'s *estate.*

The learned judge being made aware of G.'s *suicide, referred the application to the full Court.*

On the 15th June, the application was renewed in Court and refused.

On the 20th June, an application was made to the Court by creditors of G., *other than* Du Toit & Co., *for an interdict restraining the Sheriff from parting with the proceeds of the sale of the goods attached.*

The Court ordered the goods to be sold, but directed the Sheriff not to pay out the proceeds until further order.

G. *left a will under which he appointed his wife executrix testamentary but she did not take out letters of administration.*

On the 26th June, after the sale of the goods attached, Du Toit & Co. *applied to the Court to have the proceeds of the sale paid to them.*

Held, *following* Van Reenen v. Pearson (1 Ros., 236), *that* Du Toit & Co. *were entitled to the proceeds of the sale in satisfaction of their judgment.*

Du Toit and De Waal v. Greeff's Estate 199

Executor testamentary—Application for release from office.

Where an estate had been practically wound up, the only duty incumbent on the executors testamentary being to pay over certain rents as they were received to one of the heirs, and one of the executors testamentary (The British Resident in Pretoria) *applied to be relieved of his office on the grounds of his official position, absence from the Colony, and consequent in-*

PAGE

ability to give personal care and attention to the estate, the Court declined to grant the application.

Ex parte De Wet.—*Re* Estate Jones and Wife 126

Expropriation—Land burthened with a *fidei-commissum*—Act 26 of 1893.

The Town Council of Cape Town can, under their Act 26 *of* 1893, *expropriate for public purposes land burthened with a fidei-commissum, within the limits of the Municipality.*

Town Council of Cape Town v. Hiddingh's Executors 159

Extradition — Warrant — *Prima-facie* evidence.

Where there was sufficient prima-facie *evidence, in the opinion of the Law Officers of the Crown, to justify the issue of a warrant for the arrest of a person charged with theft in the South African Republic, and the alleged thief was arrested in the Colony and detained in gaol pending his extradition,*

The Court refused on the petition of the prisoner to order his discharge from custody, although the person, on whose affidavit the warrant was issued, alleged in a subsequent affidavit that possibly he had only a civil action against the prisoner.

Re Rothkugel 193

Fidei-commissum—Lapse—Death of the Fidei-commissaries in the lifetime of the Fiduciary.

In 1854 *the parents of* S. *by their mutual will bequeathed to her, after the death of the survivor, the usufruct of two farms with remainder to her two children.*

S.'s *mother died in* 1858 *and the surviving spouse adiated.*

S.'s *two children died in* 1860 *in their mother's lifetime.*

In 1868 S.'s *father, who died in* 1873, *transferred to her the two farms* subject to the terms of the will.

PAGE

Thereafter on the petition of S, *the Court authorised an amendment of the transfer deed of* 1868 *by freeing it from the terms of the will.*

Ex parte Strauss 121

Fraudulent alienation — *Prima-facie* evidence—Interdict.

Where there was prima-facie *evidence that an insolvent, before his estate had been sequestrated, fraudulently sold to one of his brothers certain furniture and stock, the Court granted an interdict restraining the insolvent's brother from parting with the articles pending the bringing of an action by the* curator bonis *to have the sale set aside as fraudulent.*

Versveld's Executor v. Friedman ... 140

Insolvency—Provisional trustees.

Where upon the petition of a majority of creditors representing claims amounting to £2,000 *two provisional trustees had been appointed, and no election was declared at the second meeting, the Court refused to substitute the nominee of a creditor for over* £6,000 (being the balance of the purchase price of a farm sold to the insolvent but of which he had not taken transfer) *although no notice had been given to such creditor of the application for the appointment of the provisional trustees.*

Greef's Executrix v. Steytler and Wilmott. — *Re* Lewin's Insolvent Estate 109

2. ——Provisional trustee with power to carry on business—Application for appointment before final decree.

Where before the final adjudication application was made for the appointment of a provisional trustee in an insolvent estate to carry on the insolvent's business, that of a bottle-store keeper, the Court refused the application but referred the matter to the Master to appoint a curator bonis.

Re Secretan's Insolvent Estate 185

PAGE

Interdict.

The Court granted an interdict restraining a respondent from receiving certain moneys due to him and the applicant by the Government, pending the bringing of an action by the applicant for breach of contract.

The rule was ordered to stand as the summons.

Ex parte Carter.—*Re* Carter v. Stewart 159

Land—Sale—Error in transfer deed—Declaration of rights.

In January, 1881, G. *became the registered owner of certain two pieces of land, one measuring one square rood, and the other* 21 *square roods and* 55 *square feet, with a cottage thereon, and thereafter he erected another cottage on his land.*

In February, 1883, G. *sold by public auction the first-mentioned cottage, together with the land on which it stood, to* B., *who took possession and remained in occupation until* 1894, *and the remaining land and cottage he sold to* A.

In the deed of transfer passed by G. *to* B. *the land on which the cottage stood was not included, and through error transfer was only passed of the* 1 *square rood.*

B. *in ignorance of the error accepted the transfer.*

The transfer deed in favour of A. *included the cottage and remaining ground bought by* B., *the land being described as measuring in extent* 21 *square yards and* 55 *square feet.*

A. *thereafter sold the property as he had bought it, and eventually in* 1891 *it was purchased by* H. *according to transfer deed and diagram, but he did not become aware that it included the cottage purchased by* B. *until some time after the sale to him, when he had the land surveyed.*

In an action for a declaration of rights instituted by H. *against* B., H. *was declared entitled to the cottage bought by* B. *in* 1883, *but compensation was given to* B. *in respect of improvements.*

PAGE

Hudson v. Bradshaw 171

Lease—Rent reserved—Option of purchase — Covenants—Breach—Interdict.

B. *by a deed of lease demised certain premises to* H. *for a term of five years at a reserved rent, payable on* 1*st January and* 1*st July in each year.*

It was provided inter alia *by the lease that if any rent reserved or any part thereof should remain unpaid for the space of three months after the time appointed for payment thereof, the lessor might, if so disposed, declare the lease cancelled.*

It was further provided that the lessee should have the right to purchase the premises at any time during the term of the lease for £5,000, *but should a satisfactory offer be made for the premises during the term of the lease by any other person or persons, the lessor should be bound and obliged to give the lessee the refusal of the same for thirty days at the price and upon terms so offered by such other person or persons.*

In March, 1894, *the rent not being three months in arrear*, B *without giving* H. *the refusal of the property sold it for* £1,400 *and on the* 6*th April*, 1894, *gave* H. *notice that the lease was cancelled, the rent being more than three months in arrear.*

H. *applied for an interdict restraining the transfer of the property. In his petition he alleged that he had spent large sums in effecting improvements, but he did not specifically deny that the rent was in arrear.*

The Court made no order on the application, but granted H. *leave to amend his petition by alleging either that no rent was in arrear, or that his claim for improvements exceeded*

PAGE

the amount of the arrear rent, and directed that notice should be given to B. *and to the purchaser that any dealing with the property would be at their risk.*

Ex parte Hill—*In re* Hill v. Bilborough 130

Libel —Truth —Justification — Absence of malice—Benefit Society—Expulsion.

P., *a member of a Benefit Society, made certain charges against the secretary, which were investigated and found to be false.*

By the rules of the society any member in arrear with his subscription ceases ipso facto *to be a member, although he may be re-admitted to membership on payment of his arrears.*

P. *was in arrear with his subscription, and was expelled from the society.*

After the investigation as to the charges brought against the secretary, P *reiterated the charges.*

The society thereupon inserted a notice in a local paper to the effect that the charges brought by P. *against their secretary were false, malicious and without foundation, and that* P. *had been expelled from the society.*

In an action in the Magistrate's Court for £20 *damages, brought by* P. *against the society for libel in publishing the notice, judgment was given for the defendants on the grounds that they were justified in publishing the notice, and that they had done so without malice.*

On appeal, *the Magistrate's judgment was upheld.*

Pietersen v. October and Others ... 146

Liquor licence — Local option — New licence—Memorial—Act 25 of 1891, section 13, sub-section 1, section 15, sub-section 1)—Licensing Court.

M. *applied for a new licence to carry on the business of a bottle store in the Municipality of Molteno and lodged a memorial in terms of Act* 25 *of* 1891, *section* 13, *sub-section* 1.

PAGE

The memorial did not contain the signatures of a majority of voters registered in the Municipality for the election of members of the Divisional Council.

The Licensing Court, acting bona fide, *and in ignorance that the Secretary of the Divisional Council had not complied with section* 15, *sub-section* 1, *of the Act, granted the licence.*

The Supreme Court, on motion, set aside the proceedings of the Licensing Court as being illegal and gave costs against M.

Gibson and Morgan v. Manley and the Albert Licensing Court. Kerr and Pinnoy v. Manley and the Albert Licensing Court 196

Lost Bond — Certified copy — Deeds Office—Practice.

The Registrar of Deeds will not issue a certified copy of a lost mortgage bond without an order of Court.

Ex parte Stone 138

Lunatic — Funds in possession of the Master.

The Court refused to direct the Master to pay out funds in his possession belonging to a person, who was alleged to be insane, for his support and maintenance, until such person had been declared of unsound mind.

Re Neethling 137

Marriage in community—Insolvency—Surplus.

Where the estate of a man married in community had been sequestrated as insolvent, and there was a surplus after paying the liabilities of the estate, the Court, on the petition of the insolvent's wife, who alleged that she was without means and ignorant of her husband's whereabouts, granted a rule nisi *calling upon him to show cause why one half of the surplus in the hands of the Master should not*

PAGE

be paid to her at once, and the interest on the balance devoted to the support of his minor child.

Ex parte Mewes 131

Minor — Will — Immovable property — Sale.

Where immovable property, which had been bequeathed to a minor, had become dilapidated, and there were no available funds wherewith to repair it, the Court, on being satisfied that it was clearly for the benefit of the minor, authorised the sale of a portion of the property.

A provision in a will that the immovable property shou'd remain in the family name as long as possible *held not to amount to a* fidei-commissum.

Ex parte Carey. *Re* Carey's Will ... 129

2. ——Capital.

Where it was clearly for the benefit of a minor to enable her to go to Europe to consult specialists as to her state of health, the Court authorised her tutor to sell £500 worth of Cape Government Stock, part of the minor's capital, to defray her expenses.

Ex parte Horne. *Re* the Minor Rademeyer 147

3. —— Father's right to custody — Interdict.

The Court, on being satisfied that a father owing to his intemperate habits and violence was not a fit and proper person to have the custody of his minor children, restrained him by interdict from removing them from the South African College School and taking them with him to America.

Woodford v. Woodford 148

4. —— Transfer of land — Want of consideration

Where land had been transferred without consideration by the father of certain minors, in his capacity as agent of an executrix, to himself, as father and natural guardian of his minor children, the Court refused to authorise him to re-transfer the property to the estate, leaving the executrix to her remedy by action against the minors.

Ex parte Glynn 124

Mohammedan Church — Imaum — Election — Congregation — Mogamat and Others v. Moliat 162

Native marriage—Custom—Cattle.

Where two natives have been lawfully married by native custom the husband, on his wife's death, is not entitled to divert the cattle, apportioned according to custom to her house, to the house of his second wife although he may have married the latter by Christian rite.

Jeke v. Judge 132

Police-constable — Misconduct — Dismissal — Resident Magistrate — Ordinance 25 of 1347.

A Resident Magistrate has no authority, under Ordinance 25 of 1847, to dismiss from the force a police-constable who has been guilty of misconduct.

The proper course to be adopted in such cases is laid down in section 6 of the Ordinance.

Regina v. Willem Wentzel 192

Scotch Law Agent — Application for admission as an attorney of the Supreme Court—Charter of Justice, Section 19.

A Scotch law agent, not being a Writer to the Signet, who is qualified to practise in the Sheriff Courts in Scotland, but who has not paid the fees necessary to qualify him to practise before the Court of Session, is not entitled to be admitted as an attorney of the Supreme Court.

He may however be admitted to practise in Circuit Courts under Rule of Court 198.

Ex parte Milligan 114

PAGE

Shares — Attachment — Discharge of order.

Where shares in a gold-mining company registered in the name of I., *who was domiciled in the South African Republic, had been attached to found jurisdiction in an action about to be instituted against* I., *and it afterwards appeared that the shares, although registered in the name of* I., *were really the property of* D. & Co. *for whom they had been acquired by* I. *as their agent, and* I. *on ceasing to represent* D. & Co. *had handed the share scrip to* D. & Co.'s *new representative, who had received dividends on the shares on behalf of his principals, but the shares had not been transferred in the company's books in the name of* D. & Co. *because the company was in liquidation, The Court on the application of* D. & Co. *discharged the order of attachment, but made no order as to costs.*

Dunkelsbuhler v. Liquidators Cape of Good Hope Bank 202

Spray pump—Machinery for agricultural purposes — Act 1 of 1889, Schedule B.

A Vermoral sp-aying pump is machinery for agricultural purposes, and as such, is duty free under Schedule B of Act 1 *of* 1889.

Rudd v. Colonial Government 142

Theft--Evidence of accomplices—Conviction.

Where A. *was convicted of theft on the evidence of two accomplices, who were believed by the Magistrate, the Court on appeal refused to quash the conviction.*

Regina v. Adams 122

2. ——Conviction sustained on appeal—Regina v. Salmon Klaas 153

Trade-mark—Cigarettes—Maker's name —Illegal use of—Interdict.

Where a trade-mark consisting of the words "The Noted Camp Cigarettes" *was sold by order of Court, but the maker's name formed no part of the trade-mark, the purchasers were restrained by interdict from using the maker's name in conjunction with the words* "The Noted Camp Cigarettes."

Lewis v. Holt and Holt 115

Will—Validity.

The Court refused to decide on motion as to the validity of a will which was alleged to have been improperly executed.

Ex parte Dickerson. — *Re* Jamieson's Will 158

Wills Ordinance, No. 15 of 1845, section 3—Intestacy.

H. *by his will bequeathed a specific legacy of* £50 *to his sister and the remainder of his estate to his wife* (whom he appointed his executrix) *for the maintenance and support of herself and children.*

The will was written throughout in the handwriting of the testator but was only attested by one witness.

Held, *that the will was not a privileged will and that* H. *had died intestate.*

Ex parte Herbert.—*Re* Herbert's Will 111

REPORTS OF ALL CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE MONTHS OF JULY, AUGUST AND SEPTEMBER, 1894.

(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE SUPREME COURT.

SUBSCRIPTION PER ANNUM, £2 2s. POST FREE.

VOL. IV.—PART III.

CAPE TOWN:

PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S ST.

1894.

TABLE OF CASES.

	PAGE
Alford, Wills & Co. v. Daniels	309
Austin v. Raphael	276
Badenhorst, *re*	301
Badenhorst v. Badenhorst	207
Beedle & Co. v. Meyers	295
Bell v. Fraser & Co.	314
Bisset, *ex parte*	215
Botha and Lind v. Prins	209
Brand v. Cowling & Co.	267
Brandt, *alias* Brown, *re*	268
Briscoe and Soeker v. Rolfe	207
Brown, *ex parte*	212
Budd v. Yeomans and Budd	250
Budler v. Jeppe and Another	240
Burns v. Town Council of Cape Town	314
Buyskes v. Cosnett and Hurley's Heirs	301
Cape of Good Hope Bank, *re*	209, 251, 268
Cape Town Harbour Board v. Cowling & Co.	267
Carl v. Carl	250, 268, 291
Carter v. Stewart	218
Coetzee and Another v. Brown	216
Colonial Government v. Hepworth & Son Limited)	282, 311
Colonial Government v. Opperman	314
Colonial Government v. Spence & Drury	214, 254
Conroy v. Jackson	210
Constable v. Theron	270
Costello (minors), *re*	268
Cranko v. Gibson	249
Curtis v. Runge	309
Davis v. Davis	268
De Bruyn's Executor v. Steyn	208
De Villiers, *ex parte*	205
Du Plessis v. De Bruyn and Another	218
Du Preez's, Insolvent Estate, *re*	205
Dutch Reformed Church, Calvinia v. Biccard	267
Eaton, Robins & Co. v. Philip	208
Edmunds and Others v. Wellington Municipality	306
Elffers, *ex parte*	205
Erlank, *ex parte*	209
Fleming v. Fleming	297
Forrest & Co. v. Cowling	295
Fox, *ex parte*	216
Frankau & Co. v. Pope	210
Garreau, *ex parte*	217
Gavin, *re*	221
Gibson, *ex parte.—Re* Wicht's Estate	214
Gladstone v. Stableford	297
Goodyear, *ex parte*	309
Graham's Executors v. Bester	309
Green v. Bradford	301
„ v. Keese	207
Haarhoff's Trustee v. Mason	208
Halse v. Halse	215, 290
Hand and Others v. Du Toit and Fischer	216
Haug v. Lithman & Co.	208
Hawkins, Estate, *re*	311
Herman, *ex parte.—Re* Krul's Estate	239
Hertzog v. Strydom	208
„ v. Woest's Estate	240
Hoffa, *ex parte.—Re* Terblanche's Insolvent Estate	215
Hofmeyr v. Dean	290
Holst, *ex parte*	310
Hope Aerated Water Co. v. Gibbs	261
Horwitz v. Lloyd	285
Independent Companions' Society v. Stemmet	228
Jones & Co v. Weisman	290
Jooste v. Keyter	309
Jurgensen v. Kunyan	278
Keytel, *ex parte*	241
Klaiber v. Klaiber	209, 311
Knysna Divisional Council v. Kannemeyer and Others	209
Kriel, *ex parte*	309
Kruger v. Van Reenen	214, 215, 250
Krynauw & Co. v. Reyneke	208
Kuys v. Bredell	208

	PAGE
Lange's Insolvent Estate, *re*	291
Langfield v. Whittlesea Village Management Board	231
Lawrence v. Lawrence	291
Lawton, *ex parte*	216
Lee, *ex parte*	295
Loots and Wife, *ex parte*	239
Loubser (minor), *re*... ...	240, 268
Lyons v. Jewish Public School ...	258
Makalela v. Makalela	251
Malan, *ex parte*	205
Malcolm's Trustee v. Haas, Vaughan & Co.	208, 217
Manley v. Gibson and Morgan ...	217
Master v. Biccard	301
,, v. Keyter	301
,, v. Marincowitz's Executors ...	216
,, v. Stone's Executor	208
Mathlabani and Tala v. Spogter ...	250
McGrath v. McGrath	218
McLeod v. Meyers	309
Meintjes Estate, *re*	300
Mercantile Corporation U.S. and S.A., *re*	241
Metelerkamp's Executor v. Landman ...	237
Meurant (minors), *re*	240
Mewes, *ex parte*	209
Mewes v. Mewes	209
Michau (minor), *re*	213
Mills v. Colonial Government ...	263
Milne v. Milne ... 217, 221, 241,	297
M Lingwana and Hobbs v Gola and Seko	225
Moller, *ex parte*	309
Moore v. Moore ... 221, 240, 301,	311
Moroney (minors), *re*	240
Morris v. Pippin	309
Myburgh's Executors v. Blanckenberg's Executor	310
Nadea, *ex parte*.—*Re* Nakiba's Will ...	215
Nannucci v. Pedersen Bros.	290
,, v. Wilson & Co.	233
Naude, *ex parte*	249
Nissen v. Moolman...	208
Paarl F. P. Co., *re*	209
Partridge v. Blake	280
Paulse and Roelof v. Theunissen ...	236
Petersen v. Little	295
Phillips v. Goddard	213
Portor, *ex parte*	240
Pretorius (minor), *re*	205
Price's P. Candle Co. (Limited) v Everitt & Co.	211
Proctor v. Christ	271
Rautenbach's Estate, *re*	314
Regina v. Burke	314
,, v. Clickman	315
,, v. Du Preez and Badenhorst ...	252
,, v. Havenga...	269
,, v. Kukkuk	311
,, v. Picqueer	315
,, v. Reed	219
,, v. Taylor	254
,, v. Tobias	313
Roberts v. Duthie	287
Robinson v. Robinson	243
Ross v. De Wet	249
Rossouw's Executor and Heirs v. Rossouw's Executor ... 209, 278,	289
Runciman v. Hantam	208
Sage's Estate, *re*	241
Schmidt's Estate, *re*	313
Sear, *ex parte*	249
Sellar Bros. v. Dean...	290
Siebert v. Siebert	313
Smit, *ex parte*.—*Re* Smit's Will ...	215
Smit v. Smit	251
Spencer, *ex parte*	216
Spendlove v. Gunning	216
Spiers v. Mutual of New York ...	291
Stanley, *ex parte*	209
Stemmett's Estate, *re*	291
Stent v. Williams, N.O.	282
Stephan Bros. v. Engelbrecht... ...	236
Strydom v. Jacobs' Executors ...	221
Suttar and Others v. Rabanic ...	216
Swemmer v. Calitz	241
Syfret, *ex parte*	301
Syfret and Another v. Van Dyk ...	314
Te Water v. Wright	208
Tomes v. Tomes	249
Trevaskis v. De Vos	241
Union Bank, *re*	310
Van der Byl & Co. v. Basson & Blatt ...	207
Van der Riet, *ex parte*	214

	PAGE
Van der Riet & Goodwin, *ex parte* ...	241
Van de Sandt de Villiers & Co. v. Biccard	290
Van Noorden v. Vedders and Another ...	249
Van Rensburg's Insolvent Estate, *re* ...	268
Van Rooyen, *ex parte*	217
Van Wyk's Executors v Biccard ...	290
Vermaak's Executors v. Vermaak ...	308
Verwey (minor), *re*	313
Vintcent, *ex parte*	206
Von Post, *ex parte*	205
Ward, *ex parte*	268
Whittling v. Whittling ...	268, 301
Wiley & Co. v. Knox	208
Woest v. Woest's Executors	208
Woodhouse's Insolvent Estate, *re* ...	241
Zeederberg v. Ablesohn	208
Zondagh, *ex parte.—Re* Zondagh's Est.	307

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT
(IN CHAMBERS).

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON K.C.M.G.].

Ex parte DE VILLIERS. { 1894. July 3rd.

Mr. Buchanan moved for the admission of Mr. Secundus Petrus de Villiers as an advocate.

Mr. De Villiers took the oath, and was duly admitted.

Ex parte ELFFERS.

Mr. Buchanan moved for the admission of Mr. Hubertus Elffers as a translator of the Supreme Court.

Mr. Elffers took the oath, and was duly admitted.

Re DU PREEZ'S INSOLVENT ESTATE. { 1894. July 3rd.

This was an application for the appointment of a trustee with full power to administer and finally liquidate the said estate, no election having been carried out at the second meeting of creditors held before the Resident Magistrate at Bredasdorp.

Mr. Schreiner, Q.C., for applicant; Mr. Searle, Q.C., for certain creditors.

After argument,

The Acting Chief Justice said. It will be better in the interests of all concerned to appoint Mr. Syfret sole trustee, with power to administer. The costs of the application to come out of the estate.

Re MINOR PRETORIUS.

Mr. Watermeyer applied for leave to the executors testamentary of the late Mathys J. Pretorius, the minor's father, to pay out from funds in their hands to the credit of the minor a quarterly allowance to enable him to prosecute his studies at the South African College. The sum of £140 per annum was asked for, the capital being £1,172. The Master recommended that £120 (including the interest on the capital) should be paid.

The Court made an order in terms of the Master's report.

Ex parte VON POST. { 1894. July 3rd.

This was the petition of Hugo von Post, which set forth that on 4th September, 1893, he obtained leave from the Supreme Court to raise a sum of £250 on mortgage of certain landed property registered in his name, as the father and natural guardian of his minor daughter, Olgo von Post, and transferred to him in that capacity on 28th July, 1891 (*vide* 3 Shiel, 227).

That the property consisted of a dwelling-house and an iron structure, which the petitioner had coverted into a shop and dwelling-house, now used and occupied by him as such.

That he had sold the first mentioned house for the sum of £300 (the realization being in petitioner's opinion of a satisfactory nature, and to the interests of the minor).

That he was desirous of transferring the property so sold to the purchaser and of paying the purchase price, less the amount of the mortgage, broker's commission, and the expenses of the present application, into the Master's hands to the credit of his minor daughter.

The prayer was for an order authorising the petitioner to pass transfer of the property to the purchaser, the purchase price, less the amount of the mortgage and the other expenses above referred to, to be paid to the Master on account of the minor.

The Master reported in favour of the petition, on condition that the payment of the mortgage bond should be the first charge against the purchase money.

Mr. Sheil for the petitionor.

The Court granted the application in terms of the Master's report.

Ex parte MALAN.—*Re* MALAN'S AND FOURIE'S ANTE-NUPTIAL CONTRACT. { 1894. July 3rd.

Ante-nuptial Contract—Bond—Erroneous instruction to Notary—Non-registration—Act 21 of 1875, Section 7.

M before his marriage instructed a Notary to draw up an ante-nuptial contract.

M purported in the contract to settle a bond for £1,800 on his intended wife.

After the execution of the contract, and M's *marriage, the Notary discovered that an erroneous discription of the bond had been given, and before he could receive fresh instructions from* M, *who really wished to bring two bonds amounting to* £1,930 *into settlement, the period within which ante-nuptial contracts must be registered under Act* 21 *of* 1875, *Section* 7, *had expired, and the contract was not registered.*

The Court, on an application for relief, allowed an amended contract containing a correct description of the bonds to be registered.

This was the petition of Daniel François Malan, of Alles Verloren, in the district of Malmesbury.

The petitioner and one Esther G. Fourie, of Beaufort West, were married at Beaufort West on 6th March, 1894. Previous to their marriage the petitioner and his intended wife executed an ante-nuptial contract before a notary. At the time of the execution of the contract the petitioner was desirous of settling upon B. T. Pritchard, of Beaufort West, in trust for, and for the benefit of, his then intended wife, two mortgage bonds.

The petitioner alleged that being at the time away from home, and not having the bonds with him, he was unable to give the notary full and correct particulars regarding the same, and was obliged to give instructions that the dates thereof should be left blank in the contract, and erroneously instructed the notary that what he wished to settle was one bond for the sum of £1,810, due to him by one Rossouw, instead of two bonds for the sums of £1,500 and £430 respectively, due to him by Rossouw.

That the two bonds were the only bonds passed by Rossouw now or ever at any time hold by the petitioner, and it was his intention to have settled both these bonds in trust for the benefit of his wife in the contract.

That after the execution of the contract the notary caused particulars regarding the bonds to be obtained from the office of the Registrar of Deeds, and finding that the description thereof was incorrectly given in the contract, he did not feel justified in having the contract registered as it was, but only if amended in obedience to an order of Court.

That by the time the petitioner had reached home and had looked up the bonds, and had forwarded the same to the notary, the period prescribed by section 7 of Act 21 of 1875, and Ordinance 27 of 1846, section 1 (within which an ante-nuptial contract may be registered), had elapsed, and consequently an application to the Court became necessary to authorise the Registrar of Deeds to register the contract.

The prayer was for an order:

1. Permitting the notary to amend the contract by inserting a full and correct description of the bonds in lieu of the erroneous description of one bond of £1,810 contained in the contract.

2. Authorising the Registrar of Deeds to register the amended contract, notwithstanding the expiration of the period prescribed by the statutes above referred to.

Mr. Buchanan for the petitioner.

The Court granted the application.

The Acting Chief Justice said: It would have been better if the contract had been registered within the proper time, and when the mistake had been discovered leave might have been asked to amend it. As, however, the application appears to be *bona fide*, the order will be granted as prayed.

[Petitioner's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

(IN CHAMBERS).

[Before Mr. Justice BUCHANAN (Acting Chief Justice.]

Ex parte VINTCENT. } 1894. July 10th.

Mr. Rose-Innes, Q.C., presented the petition of Mr. L. A. Vintcent praying for leave of absence for six months from the 11th inst., on the grounds of ill-health, as one of the liquidators of the Cape of Good Hope Bank.

The Court granted the order as prayed.

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

BADENHORST V. BADENHORST. { 1894. July 12th.

This was an action instituted by Mrs. Margaretha Jacoba Badenhorst against her husband, Johannes Jurgens Badenhorst, to have him declared of unsound mind and incapable of managing his person and property, and for the appointment of a curator to his person and property.

Mr. Maskew appeared for the plaintiff.

Mr. Sheil, as *curator ad litem*, for the defendant.

Dr. Dodds, Superintendent of the Valkenberg Asylum, Mowbray, in which institution the defendant is at present detained, deposed as to his mental condition, and consequent inability to manage his person or property.

The plaintiff gave her evidence on affidavit, and deposed as to her husband's mental incapacity.

From her evidence it appeared that the joint estate was worth about £4,350, including the farm, and that the liabilities amounted to £1,054. It was proposed to pay off the liabilities by raising a mortgage of £1,000, and an order to that effect was asked for.

The Court declared the defendant of unsound mind, and incapable of managing his person and property, and appointed his brother, Mr. Petrus Johannes Badenhorst, curator of both.

As to leave to raise a loan of £1,000 on mortgate, the curator would have to place the position of the estate before the Master, and on the latter's report the Court would make an order.

[Plaintiff's Attorney, Paul de Villiers.]

BRISCOE AND SOEKER V. ROLFE.

Charles Spencer Rolfe, in custody for debt, applied in person for release from civil imprisonment on the grounds that he had no means to satisfy his creditors' claims.

In reply to Mr. Graham, who appeared for the plaintiffs, defendant stated that £52, which he received from Bishop, he sent to Mr. Stranskey, in Johannesburg.

Counsel read a letter published in the "Star," and written by Mr. Stranskey, denying that he had ever any business transactions with Rolfe, who was only allowed to use his post-office box.

Defendant (continuing) said he had business transactions with Stranskey. Of course, he was speaking entirely from memory, as he had been in prison for some time. He was willing to make monthly payments, but could not do so at present. He never received £110 from the bank. He asked the bank to send a clerk up to the gaol, but they refused. When he came down from Johannesburg he lived rather well, as he expected £2,000 from a friend in Florence. He would endeavour to pay £5 to each detaining creditor per month. He was arrested before the cheque was presented at the bank. He had tried every one with whom he had any acquaintance in Cape Town and no one would help him.

Mr. Justice Upington: With regard to this £110, was that your own money?

Defendant: I told the Court before that the £110 was trust money, and that I had nothing to do with it. The money was for gold-mining claims on the Rand. I could not say where they are situated exactly.

In reply to the Acting Chief Justice, defendant said he would endeavour to make the first payment in a fortnight or three weeks.

Mr. Graham urged that if witness were released from prison some guarantee should be given for his carrying out his undertaking.

The Acting Chief Justice said: When Rolfe was last before the Court it was indicated that there had been some criminal acts committed by him and that proceedings were about to be taken, but any proceedings of a criminal nature must be considered apart from the civil claim. The defendant has been in prison for two months, and has twice sworn that he has no means of satisfying his debts. The Court are inclined to suspend the writ on payment by him of £5 per month to each of the detaining creditors. On payment of these amounts he will be discharged. Costs will be given against the defendant. The Court will say nothing about the criminal charges. Parties must take their own course in respect of these charges. The writ of civil imprisonment will not be suspended till the first payment has been made.

PROVISIONAL ROLL.

GREEN V. KEESE. { 1894. July 12th.

Mr. Molteno moved for provisional sentence on a promissory note for £400.

Granted.

VAN DER BYL AND CO. V. BASSON AND BLATT.

Mr. Jones moved for the final adjudication of defendant's estate.

Granted.

DE BRUYN'S EXECUTOR V. STEYN.

Mr. Tredgold moved for provisional sentence on a mortgage bond for £975, together with interest.

Granted.

TE WATER V. WRIGHT.

Mr. Sheil moved for the final adjudication of defendant's estate.

Granted.

KUYS V. BREDELL.

Mr. Tredgold moved for provisional sentence on a mortgage bond for £250, together with interest from 30th June, 1892, and that the property be declared executable.

Granted.

ZEEDERBERG V. ABLESOHN.

Mr. Duxbury moved for the final adjudication of defendant's estate.

Defendant, who was in court, said he had no money to pay his debts.

Decree as prayed.

THE MASTER V. STONE'S EXECUTOR.

Mr. Giddy asked the Court to order the respondent to file the account in the estate.

The Court made the usual order.

WILEY AND CO. V. KNOX.

Mr. Buchanan moved for provisional sentence on a promissory note for £50.

Granted.

EATON, ROBINS AND CO. V. PHILIP.

Mr. Buchanan moved for the final adjudication of the defendant's estate.

Decreed.

HAUG V. LITHMAN AND CO.

Mr. Searle, Q.C., applied for provisional sentence on a bill of exchange for £1,506 4s. 8d. The bill had been accepted payable at the African Banking Corporation, London.

Mr. Schreiner, Q.C., for defendants, said the defence was: this bill was given for the purchase price of certain cargo of timber, and the affidavits disclosed that in respect of the quality of timber sent it did not conform to what was ordered by defendants. The bill was accepted with definite reservation to set off a certain amount in diminution of the purchase price, namely, £108 13s. 10d., and £150 as security for costs.

The Court gave provisional sentence for the principal, with interest at the English rate; costs as tendered, balance of costs to be costs in the cause.

NISSEN V. MOOLMAN.

Mr. Watermeyer moved for provisional sentence on two mortgage bonds: (1) £230, with interest at 7 per cent. from January, 1889; (2) £70, with interest at 7 per cent. from October, 1890, less £16 2s. paid to account.

The Court made the order, and declared the property executable.

HERTZOG V. STRYDOM.

Mr. Duxbury moved for provisional sentence on a mortgage bond for £250, with interest at 6 per cent. from 30th June, 1893, the property to be declared executable.

Granted.

KRYNAUW AND COMPANY V. REYNEKE.

Mr. Sheil moved for provisional sentence for £75 13s. 1d., less £25 paid on account of a promissory note.

Granted.

RUNCIMAN V. HANTAM.

Mr. Tredgold applied for judgment under rule 329 for £80 0s. 6d., for goods sold and delivered.

Granted.

HAARHOFF'S TRUSTEE V. MASON.

Mr. Schreiner, Q.C., moved for judgment in terms of the summons for the delivery of certain goods, or payment of £91 0s. 6d., less £37 13s. 7d. already received.

Granted.

MALCOLM'S TRUSTEE V. HAASE, VAUGHAN AND CO.

Mr. Benjamin moved that this matter stand over until the first day of term. The goods attached to found jurisdiction to be sold, and the proceeds paid into the Standard Bank to the joint credit of Walker & Du Prees and J. & H. Reid & Nephew.

Mr. Sheil, for defendant, consented, and the order was made as prayed.

WOEST V. WOEST'S EXECUTORS.

Mr. Benjamin applied for judgment under rule 329 for an order compelling defendant to file a true and proper account of his administration of the estate of Hendrik Woest, for payment of £300, and costs *de bonis propriis*.

The Court made the order.

ROSSOUW'S EXECUTORS V. ROSSOUW.

Mr. Schreiner, Q.C., applied for judgment under rule 329, sub-section (*d*), for the sums of £100 with interest and £84 with interest.

Granted.

KHYSNA DIVISIONAL COUNCIL V. KANNEMEYER AND OTHERS.

Mr. Molteno applied for judgment for £114 17s. 5d., being amount of rates due to the Council during the years 1892, 1893, and 1894.

The Court (subject to an amendment of the summons) granted judgment as prayed.

REHABILITATIONS.

Mr. Sheil moved for the rehabilitation of the following insolvents: Gustav Zacharias Erlank, Frederick Christian Wilhelm Mewes (release), John Samuel William Stanley.

Granted.

GENERAL MOTIONS.

Re PAARL-FRUIT PRESERVING COMPANY.

Mr. Schreiner, Q.C., applied for an order authorising the official liquidators to pay off the preferent bond on the assets of the company, to fix a date within which claims shall be filed, with leave to distribute the funds in hand from time to time, and to settle the remuneration to be allowed to the liquidators.

The Acting Chief Justice said: The Court will make an order granting authority to the liquidators to pay the bond out of the proceeds in hand, fix 31st August as the day by which all claims must be filed, grant authority to the liquidators to distribute the funds as they came in, and their remuneration to be limited to 5 per cent. on all receipts.

KLAIBER V. KLAIBER.

Mr. Graham applied for a rule *nisi* requiring respondent to show cause why applicant, his wife, shall not be admitted to sue him *in forma pauperis* in an action of divorce by reason of his alleged adultery.

The Court granted a rule *nisi* as prayed, the rule to be returnable on 12th October, personal service if possible, otherwise one publication in the "Ulma Zeitung."

BOTHA AND LIND V. PRINS.

This was an application to make absolute the rule *nisi* for the attachment of respondent for contempt in respect of his failure to obey an order of this Court requiring him to execute all documents for the transfer of portions of the farms Matjes River and Geswints Kraal, in the district of Oudtshoorn, and for the appointment of some person in his stead to execute the same.

Mr. Sheil now confined his application to one for costs, respondent having since the rule was granted obeyed the order of the Court.

The Court gave judgment for costs.

Re THE CAPE OF GOOD HOPE BANK.

Mr. Schreiner, Q.C., applied for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with debtors and shareholders. The compromises have already been published.

The Court made the order.

MEWES V. MEWES.* { 1894. July 12th.

This was an application for an order authorising the Master of the Supreme Court to pay over to the applicant the surplus funds arising out of the liquidation of his insolvent estate, applicant undertaking to pay therefrom a sufficient sum to enable respondent (his wife) to join him at Johannesburg.

The respondent filed an affidavit in which she alleged that it was her intention to take proceedings to obtain a decree of judicial separation from the applicant, who was addicted to excessive drinking, and was in other ways an unfit person to live with.

That she believed that if the money now applied for were paid to the applicant it would be wasted and squandered by him, and that if she and his minor child were to proceed to Johannesburg, as proposed by the applicant, they would soon be in a destitute condition, and that in a place where she would be absolutely a stranger and with no means of obtaining a livelihood. That she was 57 years old and in very bad health, and that she had to a great extent to look to charity for the bare necessaries of life for herself and her minor child.

Mr. Searle, Q.C., for applicant; Mr. Graham for respondent.

The Acting Chief Justice said: The applicant left his wife here and went to Johannesburg

*See *ante* pages 131, 156, 195.—*Rep.*

about three years ago. He had property valued at £74 per annum, which property was bonded, and £22 had to be paid yearly as interest. The wife did not pay the interest; the bond was called up; the property was sold, and there is now a surplus of £320 in the Master's hands. The applicant now applies for this amount. He is entitled to it. He is married in community of property, and has the administration of the joint estate. The respondent now says she is going to sue for judicial separation, but in her original affidavit she said nothing about bringing such an action. The application will be granted, and applicant will be ordered to pay the respondent £40 towards the respondent's expenses to Johannesburg.

[Applicant's Attorney, J. de Korte; Respondent's Attorneys, Messrs. Sauer & Standen.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

CONROY V. JACKSON. { 1894. July 13th.

Mr. Molteno applied on behalf of Robert Conroy, hotelkeeper, Burghersdorp, for leave to attach certain moneys *ad fundandam jurisdictionem* belonging to one George Jackson, commercial traveller, now in the Free State, the said moneys being now in possession of Mr. John Seaton, hotelkeeper, Aliwal North. Petitioner averred that Jackson, who was last seen in Rouxville, Orange Free State, was indebted to him in the amount of £15 18s. 7d., being balance of account.

Mr. Justice Upington: I wish to guard myself against the endorsement of this principle: if a commercial traveller goes into the Free State or into the Transvaal in the ordinary course of business that you can immediately attach moneys in order to found jurisdiction.

The Acting Chief Justice said: The Court will make an order to attach the moneys in Mr. Seaton's hands *ad fundandam jurisdictionem;* and grant leave to sue by edictal citation; personal service; the summons to be returnable on 31st August.

FRANKAU AND CO. V. POPE. { 1894. July 13th.

Trade mark—Infringement—Pipes—Interdict.

Held, *in an application for an interdict, that the use of the letters* RRR *placed triangularly in a triangle on pipes was an infringement of the registered trade mark* BBB *placed triangularly in a diamond.*

This was an application on notice for a perpetual interdict restraining respondent from selling or importing, or otherwise exposing for sale, any tobacco, pipes, cigars, cigarette tubes and holders, cigarettes and papers for making the same, and tobacconists' fancy goods in general bearing the mark R.R.R. placed triangularly in a triangle, and which mark the applicants contended was an infringement of their registered trade mark, namely, the mark B.B.B. placed triangularly in a diamond.

The applicants' trade mark was registered in the Colony on December 6, 1881, and their agent in this country (Mr. Ernest Ebert) now alleged that the respondent, who has no registered trade mark in the Colony, was selling, and causing to be sold, certain pipes bearing the mark R.R.R. in a triangle.

That this mark was calculated to deceive the public and the ultimate purchaser, and that it was an infringement of the applicants' trade mark, and was used by the respondent for the purpose of imitating the applicants' trade mark, and was calculated to do them gross injury.

The prayer was for an interdict.

The position taken up for the respondent, who is at present in England, but who received notice prior to his leaving that proceedings would be taken, was that the pipes had been imported in the ordinary course of trade without any reference being made as to the mark, that in selling them there was no intention to deceive the public, who could not mistake the R.R.R. pipe for the applicants', and that when pipes were sold of a special brand or letters, the G.B.D. pipe was the one that was always asked for.

Mr. Schreiner, Q.C., was heard in support of the application.

Mr. Searle, Q.C., for the respondent: There has been no infringement. Under the Act the device is registered, and no one could possibly mistake a triangle for a diamond. Again entirely different letters are used. The applicants have not a monopoly of all the letters of the alphabet. He referred generally to *Sebastian* and cited the following cases: *Moet* v. *Pickering*

(6 C.D. 770; 8 C.D. 372); *In re Lindon's Trade Mark* (32 C.D. 109); *In re Burland's Trade Mark* (42 C.D. 274); *Horsburgh's Case* (53 L.J., Ch., 238); *Blackwell* v. *Crabb* (36 L.J., Ch., 501); *Leather Cloth Co.* v. *American L. C. Co.* (35 L.J., Eq. 53.)

The Court granted the interdict.

The Acting Chief Justice said: The application in this case is for an interdict to restrain the respondent from using a trade mark which the applicants contend colourably represents a trade mark registered by them. The applicants are registered owners of a trade mark B.B.B., arranged triangularly in a diamond. The respondent is not the registered owner of any trade mark, but he sells pipes bearing the device of R.R.R., also arranged triangularly in a triangle. Now the question we have to consider is whether there is such similarity between the two as to deceive the ordinary purchaser. As is laid down in *Sebastian*, the real question which the Court has to try is whether what the respondent is doing is calculated to deceive, and whether there is so much imitation in the goods bearing the one mark as to be readily mistaken for the goods belonging to the other? Now, as has been pointed out, the letters G.B.D. represent the pipes of a well-known maker; and apparently the letters B.B.B. also represent the pipes of another well-known maker. Looking at the respondent's pipes which have been produced, it strikes me as a juror that they bear a colourable imitation of the registered trade mark B.B.B. of the applicants. It is true in the one case a triangle is used, and in the other a diamond, but the letters are used in such a way as would readily deceive the ordinary customer. The letters are different, but they are arranged in the same way—triangularly, and to a casual observer look like the letters B.B.B. with the lower part of the letters indistinctly impressed upon the wood of the pipe. I don't say that the applicants have the sole right to all the letters of the alphabet, nor do I say that the respondent could not use letters to distinguish his pipes, but he might have chosen other letters, or arranged them in such a way that they could not have been mistaken for the applicants' trade mark. I quite agree with Mr. Searle's argument, that general resemblance is not sufficient, but it must be a resemblance in essential parts. Under these circumstances we are bound to grant an interdict. The respondent is not in the Colony, and at the outset I suggested to counsel whether the case should not be postponed, in order to give the respondent an opportunity to state his case more fully. The respondent had ample notice; he made no inquiries, and no communication was received from him before he left. But as it may be shown that he has a registered trade mark in England, a further opportunity will be reserved to him, if so advised, to move the Court to set aside the interdict. Respondent is meanwhile interdicted from selling or exposing for sale any pipes bearing the mark now used by him, which mark the Court holds to be a colourable imitation of the applicants' registered trade mark. The interdict will carry costs.

Mr. Justice Upington: I am of the same opinion. If anybody looks at the material upon which this device is stamped, I think it will be said there is a great probability of the public being deceived.

[Applicants' Attorneys, Messrs. Findlay and Tait; Respondent's Attorney, D. Tennant, jun.]

PRICE'S PATENT CANDLE COMPANY, LIMITED V. EVERITT AND CO. { 1894. July 13th.

Trade mark — Infringement — Candles — Interdict.

The Court granted an interdict restraining the respondents, a firm carrying on business in Port Elizabeth, from selling candles manufactured by them and bearing on the wrappers the device of a ship in full sail, on the grounds that the device was an infringement of Price's well-known trade mark, although the ship as used by the respondents was differently rigged to that of Price's.

This was an application on notice for a perpetual interdict restraining the respondents from selling or passing off, or enabling others to sell or pass off, any candles not being the applicants' manufacture or merchandise as and for candles of the applicants' manufacture or merchandise, and from using any labels, price list, wrappers, or other documents so arranged or contrived as to be calculated to represent or lead to the belief that candles so sold or offered for sale by the respondents, and not being the applicants' manufacture or merchandise, are candles of the applicants' manufacture, and from in any manner using upon, or in connection with, candles, not of the applicants' manufacture, any device representing a ship in full sail, or any similar label or wrapper containing any such device, and from infringing the applicants' trade marks registered in England and in the Colony.

The applicants' trade mark (a ship in full sail) was registered in the Colony on 15th

March, 1893, and their brand of candles is known in the market as "Ship Candles," or "Shipmark Candles."

The respondents carry on business at Port Elizabeth as manufacturers of candles. and since 1891, they have used a label wiih the representation of a ship in full sail, but they have not registered it as a trade mark. This representation the applicants alleged was an infringement of their trade mark, and they prayed for an interdict.

The respondents now alleged that in adopting their label they acted in good faith, and did not know until the present proceedings that the label was in any way impugned as infringing the applicants' rights.

That the candles bearing their label were not known or sold in the trade in this colony as "Ship Candles" or "Shipmark Candles," they were simply known as Everitt's candles.

In the present proceedings the Court took judicial notice of two injunctions granted by consent, in the High Court of Justice, England, at the instance of the present applicants, one against E. & H. Holdsworth, Old Abbey Candle Works, West Ham, London, their infringement being the representation of a "Lightship," and the other against Palmer & Co. (Limited), Stratford, London, their infringement being the representation of a "Man-of-War."

Mr. Searle, Q.C., appeared for the applicants.

Mr. Schreiner, Q.C., for the respondents.

The Court granted the interdict.

The Acting Chief Justice said: The remarks made in the last case apply equally in this case, but we are aided in our decision by two previous decisions in England. These two cases, in which the applicants have obtained injunctions against other candle manufacturers in England, show to what extent the English Courts will go in these cases of trade mark interdicts. The device here is a ship in full sail. In the case of *Holdsworth* the device was a lightship without any sails, but the interdict was granted. In the other case, *Palmer's*, the device looked more like a floating battery than a ship, but there also the Court granted the interdict. Now in the case before us the device of respondents is very similar to the applicants', and we have no hesitation in saying that it is a colourable imitation. Under these circumstances the interdict will be granted, costs must follow the order in the usual way.

Mr. Justice Upington: I am of the same opinion. In an advancing country like this we cannot be too careful in protecting the trade marks of well-known traders.

[Applicants' Attorneys, Messrs. Reid and Nephew; Respondents' Attorneys, Messrs. Scanlen and Syfret.]

Ex parte BROWN. } 1894. July 13th.

Minor—Money—Re-investment.

A mother authorised to re-invest money for the benefit of her minor daughter.

This was the petition of Mrs. E. M. Brown, who in July, 1891. as mother and natural guardian of her minor daughter, invested the sum of £400 at 6 per cent. per annum on first mortgage of a farm in the division of Peddie, the mortgagor being one Mrs. Balderson.

The minor is thirteen years of age, and the interest has been applied towards her education, maintenance, and support.

The bond has been paid off, and the petitioner alleged that she desired to re-invest the money on first mortgage at 6 per cent. to complete her daughter's education; but that she (petitioner) was informed that the Registrar of Deeds declined to cancel the bond passed by Mrs. Balderson to the petitioner in his said capacity, except by order of the Court, or unless the amount were paid into the Guardians' Fund.

That it was to the minor's interest that the money should be re-invested at 6 per cent. rather than that it should be paid into the Guardians' Fund bearing interest at only 3½ per cent.

The prayer was, that the petitioner might be allowed to re-invest the £400 on first mortgage at 6 per cent., and that the Court would sanction the cancellation of the mortgage bond by the Registrar of Deeds.

The matter was submitted to the Registrar, who reported as follows:

I was disposed, in view of the decision in *Van Rooyen* v. *Werner* (9 Juta, 425), to cancel this bond without an order of the Court, but inasmuch as this would be a variance of the practice hitherto existing in this office, and as a desire has been expressed for a definite ruling for future guidance, I refer the petition to the Court.

Mr. Searle, Q.C., was heard in support of the application, and referred to *Van Rooyen* v. *Werner* (9 Juta, 425. and 2 Sheil, 295) and *Ex parte Hopkins* (4 Sheil, 59).

The Court granted the application.

The Acting Chief Justice said: But for the fact that the Registrar of Deeds says it was the former practice to make application to this Court in such cases as the present I should have thought it would have been unnecessary to come here. But since the application has been made the Court will make the order. There is no trust impressed upon the property in question, and the mother can invest it by taking a fresh mortgage bond. Where a minor is interested in

immovable property the principle is altogether different, and any dealing with it must receive the sanction of the Court.

[Applicant's Attorneys, Messrs. Van Zyl and Buissinné.]

IN THE MATTER OF THE MINORS MICHAU.

Mr. Buchanan moved for leave to the guardian of the said minors to raise a sum of money on security of the portions of the farms Groot Vley and Plankfontein, in the district of Cradock, bequeathed to them by their father, William Jacobus Michau, to enable them to obtain transfer thereof, and to pay certain balance due to the estate.

The Court made the order in terms of the Master's report.

PHILLIPS v. GODDARD. { 1894. July 13th.

Assault—Damages—Provocation.

Where in an action in a Magistrate's Court, for £20 damages for assault, the Magistrate found that the assault had been provoked by the plaintiff's own conduct, and granted absolution from the instance on the claim for damages. The Court, on appeal, upheld the Magistrate's decision.

This was an appeal from a decision of the Resident Magistrate of East London in an action in which the present appellant (plaintiff in the Court) below, sued the respondent (defendant) for £20 damages for assault.

The Magistrate granted absolution from the instance. The more material facts appear from his reasons, which were as follows:

In this case the plaintiff sued the defendant for the sum of £20 as compensation in damages for assault. He alleges that the defendant on or about the 9th day of March, 1894, and at or near East London, assaulted and ill-treated him, and claims damages in the sum of £20.

On the 28th March, 1894, the plaintiff prosecuted the defendant before the Assistant Resident Magistrate of East London for the alleged assault, when the defendant was convicted and fined £2, or one month's imprisonment with hard labour. The fine was paid.

On the 9th day of April, 1894, the plaintiff issued summons claiming £20 as and for damages arising out of the alleged assault.

On 17th April, 1894, the case came before the Assistant Magistrate, then acting as Resident Magistrate, but he was recused by the defendant, and the case finally came before me on the 22nd May, 1894.

The evidence taken at the criminal trial was admitted as evidence in the civil case, and the witnesses were re-examined.

It appears that on the 9th March, 1894, the defendant was proceeding with his wagon loaded with wood towards East London, when the plaintiff appeared on horseback and the alleged assault took place.

There does not appear to have been any previous quarrel between the parties, the plaintiff merely alleging that he was not on speaking terms with the defendant, the latter stating that he had no grudge towards the plaintiff, and previously to this had not been in any trouble with anyone.

The plaintiff alleges that he did not in any way provoke the defendant, and that the assault was not brought on by any conduct of his. The defendant on the other hand alleges that at a particular part of the road he, as driver of the wagon, found it necessary to use his whip, and that when doing so, the plaintiff, who was coming up on horseback and whom he had not seen, made use of, to say the least, very objectional language, and then rode up and words passed between them.

That the defendant got off the wagon, as he was doing so plaintiff struck him twice with the butt end of his hunting crop slightly on the left shoulder and then tried to trample him with his horse. That plaintiff struck him again, and again came on with his horse, when defendant had to act in self defence and struck him with the thin end of the whip-stick and that a fight then took place.

The witness Lundevsteat corroborates the defendant as to what took place when plaintiff arrived, but he went on with the wagon some distance, and when he returned with the witness Mitford Goddard, who was in front with his wagon, he found plaintiff and defendant standing together on the side of the road.

The only other witness for plaintiff as to the occurrence is the native Kongani, who says when he came up plaintiff and defendant were struggling on the ground, the defendant on top, but this the other witnesses deny. If true however, it does not assist the plaintiff's case to any extent, as the question for decision, in my opinion, is who was to blame in the first instance, because if defendant speaks the truth, and there is no reason why he should not be believed, the plaintiff deserved all he got.

The parties are respectable young farmers living in the same neighbourhood, and it is not possible on the evidence, as it stands, to say with any degree of certainty what the actual facts are, but the contention of the plaintiff that without provocation of any kind whatever the defendant committed the assault in question is wholly unreasonable. There was no outstanding quarrel between them, and therefore absolutely no motive for the assault.

The probabilities are that the quarrel commenced as described by the defendant, the plaintiff, coming up just as the defendant was in the act of using his whip, appears to have at once concluded that the defendant had done so knowing he was close by with some ulterior motive, and foolishly, and without cause, lost his temper, and by his conduct brought about the unpleasant results he complains of, and therefore in my opinion he cannot succeed in his action for damages.

There was evidence to show that the plaintiff had been somewhat severely handled, as he had several cuts on his head, hands and arms, and these injuries the District Surgeon stated would have kept him from heavy work for three weeks or a month.

The defendant showed no blows or marks of any kind.

Mr. Searle, Q.C., was heard in support of the appeal.

Mr. Graham, for the respondent, was not called on.

The appeal was dismissed.

The Acting Chief Justice said: This is an appeal from a decision of the Magistrate of East London in a case in which the plaintiff sued the defendant in an action for damages for assault. From the Magistrate's finding it appears that the plaintiff himself provoked the assault; and under these circumstances, the Magistrate, with all the facts before him, absolved the defendant from the instance and refused to give damages against him. The appeal seems mainly to rest on this fact, that before the civil action was brought the plaintiff had brought a criminal charge against the defendant, but it was no answer to a charge of assault to say, 'Oh! he struck me first." No judge would ever hold that the assaulted party was justified in hitting back. The utmost the law allows is to take means to protect oneself. Another circumstance here is that it is not the same magistrate who tried the two cases. We have simply to deal with the civil case and in that case the Magistrate gave his judgment on common-sense, sound reasons. There was really no tremendous battery committed on the plaintiff and whatever he got he brought it upon himself. Defendant, however, was absolved, and there is no reason to interfere with the judgment. The appeal will therefore be dismissed with costs.

Mr. Justice Upington concurred, and said the appeal was utterly groundless.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

IN CHAMBERS.

[Before Mr. Justice BUCHANAN (Acting Chief Justice).]

Ex parte VAN DER RIET. { 1894. July 17th.

Mr. Buchanan moved for the admission of Mr. Frederick J. W. van der Riet as an advocate.

Mr. Van der Riet took the oath of allegiance, and was duly admitted.

Ex parte GIBSON.—*Re* WICHT'S ESTATE.

Mr. Maskew moved for authority to the Master to call a meeting for the election of a new trustee in Wicht's insolvent estate, the original trustee having died, and there being further assets in the estate to be distributed.

The Court granted the order.

THE COLONIAL GOVERNMENT V. SPENCE AND OTHERS.

Mr. Schreiner, Q.C., moved for leave to the defendants to enter appearance and defend the action.

The Attorney-General consented on condition that the applicants were ordered to pay the costs of the judgment obtained on the 12th June last and the costs of the present application.

The Court granted the applicants (defendants) leave to purge their default, they paying the costs of the judgment and the costs of the present application.

Ex parte KRUGER.

This was an application for leave to sue *in forma pauperis* in an action for seduction and maintenance.

Mr. Tredgold for applicant.

Referred to counsel.

SUPREME COURT.
IN CHAMBERS.

[Before Mr. Justice BUCHANAN (Acting Chief Justice) and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte BISSET. { 1894. July 24th.

Mr. Molteno moved for the admission of Mr. Edgar Hamilton Bisset as an advocate of the Supreme Court.

Mr. Bisset took the oath of allegiance and was duly admitted.

Ex parte HOFFA.—*Re* TERBLANCHE'S INSOLVENT ESTATE. { 1894. July 24th.

Insolvency—Trustee—Account—Extension of time.

The Court, with a view to saving costs, granted an extension of time, within which to file his account, to a provisional trustee, who was threatened with an action to recover the value of certain assets sold by him on account of the estate and claimed by a minor.

This was an application by the provisional trustee in the insolvent estate of Stephanus Salomon Terblanche for an extension of time within which to file his account.

The petitioner alleged that he had realised all the assets of the estate, amounting to £115, and was now prepared to frame his liquidation and distribution account and pay creditors their dividends.

That on 12th June he received a letter from Mr. Attorney Van den Heever demanding, on behalf of his client, one Terblanche, a minor son of the insolvent, the sum of £107 12s., being the value of certain assets sold on account of the estate in April last, which assets were alleged to have been the minor's property, and intimating that unless the demand were complied with within five days from the date of the demand legal proceedings would be instituted in the Supreme Court against the petitioner.

Thereafter the petitioner received notice from the Master to file his account, or proceedings would be taken against him.

Subsequently the petitioner wrote to Van den Heever, and ascertained that the action threatened on behalf of the minor Terblanche would be brought in the ensuing Circuit Court to be held at Burghersdorp.

Under these circumstances the petitioner asked for an extension of time, until the case in the Circuit Court had been decided, within which to file his account.

Mr. Buchanan for the petitioner.

Mr. Justice Upington: The trustee should have filed his account, leaving the minor to petition the Court. The only thing that can be said in support of the application is that costs may be saved by granting it, the estate being a small one.

The Court, with a view to saving costs, granted an extension of time until 1st November.

[Applicant's Attorneys, Messrs. Fairbridge and Arderne.]

Ex parte SMIT.—*Re* SMIT'S WILL.

On the motion of Mr. Maskew, the plaintiffs consenting, the applicants were allowed to join as co-defendants in an action to set aside the will.

HALSE V. HALSE.

On the motion of Mr. Molteno, the Resident Magistrate of Herschel was appointed *curator ad litem* in proceedings about to be instituted to have petitioner's husband declared of unsound mind. Leave was given to have the evidence taken on affidavit. The summons to be returnable on 30th August. The Curator to furnish an independent report to the Court.

KRUGER V. VAN REENEN.

Mr. Tredgold applied for a rule *nisi* calling on the respondent to show cause why the petitioner should not be allowed to sue *in forma pauperis* in an action for seduction and the maintenance of the child.

The rule was granted, returnable on August 16.

Ex parte NADEA.—*Re* NAKIBA'S WILL. { 1894. July 24th.

Will—House—Fidei-commissum.

Where a house had been bequeathed to seven legatees subject to the condition that it should not be sold before the death of the longest living of them, and that the proceeds should be then divided among their children, and one of the legatees, with the consent of the others, had sold the house to the Colonial Government, the Court refused to authorise the Registrar of Deeds to register the transfer.

This was the petition of the executrix testamentary of the estate of the late Nakiba.

The petitioner alleged that the only asset in the estate is a dwelling-house, situate at the corner of Dorp and Keerom-streets, Cape Town.

That Nakiba by her last will bequeathed to the petitioner and six others the dwelling-house in question under the condition that it should not be sold before the death of the longest living of them, but that they should during their lifetime live and reside on the premises.

That after the death of the longest living the property had to be sold by public auction and the proceeds divided among their children or further descendants.

That the petitioner was approached by a broker on behalf of the Colonial Government, and inadvertently sold the property to the Government for £650.

That she had been informed that transfer could not be given without an order of Court.

That the Government were pressing for transfer, that the property was mortgaged for £100, and that there were other debts due by the estate.

That the legatees had given their consent to the sale, provided the net proceeds were divided among them in equal shares.

The prayer was for an order authorising the Registrar of Deeds to register the transfer to the Colonial Government.

The matter was referred to the Master, and he reported as follows:

The house in question was bequeathed to the petitioner and six others, under the condition that the legatees should have merely a life usufruct therein, and that it should be sold only after the death of the longest living of them, when the proceeds were to be divided among their representatives.

On the 27th October, 1886, the petitioner applied to the Court, with the consent of the co-legatees, for permission to sell the property, but the application was refused.

Notwithstanding this the petitioner states that she has inadvertently sold the property.

There is no allegation that the position of the estate has altered since the last application was made, nor is there any positive statement that the sale has now become necessary in order to pay the debts of the deceased.

Mr. Buchanan for the applicant.

The Court made no order.

The Acting Chief Justice said: The testator desired that the house in question should not be sold until the death of the oldest surviving legatee. We cannot now alter the will. No order will be made on the application.

[Petitioner's Attorney, P. M. Brink.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

ADMISSIONS.

Ex parte FOX. 1894. August 1st.

Mr. Juta, Q.C., applied for the admission of Mr. Henry Wilson Fox as an advocate.

Mr. Fox took the oath and was duly admitted.

Ex parte SPENCER.

Mr. Juta, Q.C. applied for the admission of Mr. Harold Spencer as an advocate.

Mr. Spencer took the oath, and was duly admitted.

Ex parte LAWTON.

Mr. Buchanan applied for the admission of Mr. Alfred Benjamin Charles Lawton as an attorney and notary.

Mr. Lawton took the oaths and was duly admitted.

PROVISIONAL ROLL.

SUTTAR AND OTHERS V. RABANIE.

Mr. Benjamin applied for the final adjudication of defendant's estate.

The Court made the order.

COETZEE AND ANOTHER V. BROWN.

Mr. Duxbury asked that the provisional order of sequestration be discharged.

Granted.

SPENDLOVE V. GUNNING.

Mr. Tredgold applied for the final sequestration of defendant's estate.

Granted.

HAND AND OTHERS V. DU TOIT AND FISCHER.

Mr. Tredgold asked for the discharge of the provisional order of sequestration.

Granted.

MASTER V. MARINCOWITZ'S EXECUTORS.

Mr. Giddy applied for an order compelling the defendants to file their account.

The order was granted.

MALCOLM'S TRUSTEE V. HAUSE, VAUGHAN AND CO.

Mr. Benjamin applied for judgment under rule 239 for £318 10s. 6d., together with costs.

Mr. Sheil, for the defendants, said the goods which were attached were now in the hands of the auctioneer, and would be sold on Friday. He asked that the matter be allowed to stand over *sine die*.

The Acting Chief Justice suggested that the matter should stand over for a week, although strictly the plaintiffs were entitled to judgment.

The plaintiffs refusing to consent to the matter standing over,

Judgment was accordingly granted.

REHABILITATIONS.

On motion from the bar, Dirk Willem van Rooyer was granted his rehabilitation. Robert Alexis Garreau's estate was released.

GENERAL MOTIONS.

Ex parte MILNE.

Mr. Buchanan applied on behalf of petitioner for leave to sue *in forma pauperis* in an action against Mrs. Milne, his wife, for divorce by reason of her alleged adultery.

Referred to counsel.

MANLEY V. GIBSON AND MORGAN. } 1894. Aug. 1st.

Cost—Taxation—Review.

M. *applied to the Licensing Court of Albert for a new licence to carry on the business of a bottle store in the Municipality of Molteno, and lodged a memorial in terms of Act* 25 *of* 1891, *section* 13, *sub-section* 1.

The memorial did not contain the signatures of a majority of voters registered in the Municipality for the election of members of the Divisional Council.

The Licensing Court acting bona fide *granted the licence, but on an application made to the Supreme Court by* G. *the proceedings were set aside as being illegal and costs were given against* M.

In the taxation of costs, certain charges for serving a copy of the notice of motion and affidavits on the chairman and each member of the Licensing Court, including three members who had voted against granting the licence to M., *were allowed.*

The Court on review of this taxation refused to interfere with the Taxing Officer's discretion.

This was an application for review of the taxation by the Taxing Officer of the respondents' (original applicants) bill of costs.

The facts on which the original motion was founded will be found fully reported *ante* page 196.

On that motion costs were given against the present applicant, and in the taxation of these costs certain charges, amounting to £16 or thereabouts, for copy of notice of motion and affidavits served on the chairman and each member of the Licensing Court, including three members who voted against granting the licence to Manley, were allowed, as taxed, by the Taxing Officer.

It was contended on behalf of Manley at the taxation that these charges should not have been allowed.

First because it was not necessary to have joined the Licensing Court as respondents, and

Second, that even if it had been necessary to do so it was wholly unnecessary to have incurred the heavy costs of serving each member of the Court with a notice.

The Taxing Officer refused however to reconsider his taxation, and reported as follows:

The order as to the costs of this application is general in its terms, and, in my opinion, wide enough to cover the costs of service of the notice of motion and copies of affidavits on the members of the Licensing Court.

In the absence of any law or practice to the contrary, the usual course, in cases of this nature, has been followed.

From the language of the 30th section of the Liquor Act, No. 25 of 1891, it is clear that each member of the Licensing Court may be held personally responsible in these matters. I therefore considered separate service essential, more especially as the costs were specially claimed against them personally.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Schreiner, Q.C., for the respondents.

The Court refused the application.

The Acting Chief Justice said: In this case an application was made by Gibson and another against Manley and the Licensing Court with the object of setting aside a licence granted by the Licensing Court. After hearing the application it was ordered that the licence be set aside, and that Manley pay the costs. That, of course, only meant the necessary costs. The question, therefore, is reduced to this: Was it necessary for Gibson, in order to take proceedings to set

aside this licence, to join the Licensing Court, and if it was necessary to join the Licensing Court, how was he to do it? The Taxing Officer's report is that when a Licensing Court is joined the usual practice is to give notice to every individual member. There is nothing in the Statute to direct how notices shall be given. It has been the universal practice to join the Licensing Court in all these applications. The law does not provide how notices are to be given, and in the absence of any provision in the law the usual practice has been to give each member notice of the application. That practice has been followed in this case. It may well be—and I think there are some grounds for Mr. Searle's contention—that provision should be made for some cheap and inexpensive mode of joining Licensing Courts, as by giving notice to the chairman alone. There is no such provision at present, and under those circumstances the Taxing Officer had simply to consider whether it was necessary to give notice to each individual member. He has followed the universal practice adopted in other cases, and held it was necessary to give notice to each individual member, and he has taxed, and allowed costs accordingly. I don't think we can interfere with the Taxing Officer's decision, though it may be well worth consideration whether provision should not be made in a cheap and inexpensive way for giving notice without serving a copy on each member of the Court. I myself would be in favour of laying down a rule that notice to the chairman of the Court would be sufficient in such cases. The application must be refused with costs.

Mr. Justice Barry: I concur. Under the Act 26 of 1891 the Court might have given an order in a different form, but with the order as it stands, I see no reason for granting the present application.

Mr. Justice Upington concurred.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorney, G. Montgomery Walker.]

DU PLESSIS V. DE BRUYN AND ANOTHER. } 1894. August 1st.

Mr. Searle, Q.C., asked the Court to make the award of the arbitrator by which the remaining extent of the farm Rietfontein, in the district of Humansdorp, was divided, a rule or order of this Court.

The Court made the award a rule of Court, the costs of application to be divided in the same manner as the costs in the arbitration.

CARTER V. STEWART. } 1894. August 1st.

The circumstances which led to the bringing of the action appear at page 159. This was an action for a declaration of rights. Mr. Molteno for plaintiff; defendant in default.

Henry Carter, contractor, residing in Cape Town, deposed: I know defendant, George Stewart, who was in my employ, and remember him tendering for the Salt River Bridge in the district of Van Rhyn's Dorp. He tendered in the name of Stewart & Co., and I was to be his surety. He gave me a power of attorney to receive the moneys from the Government. The first money that fell due he received and declined to pay over to me in terms of our agreement. I eventually got £95 from him. He afterwards gave me a power of attorney which he subsequently revoked, and I was unable to draw any money from the Public Works Department.

Mr. Justice Upington: This certainly ought to open the eyes of the Public Works Department—one partner becoming surety for another.

Witness (continuing) said he had received no money on the power of attorney.

Mr. Justice Upington: Who are George Stewart & Co.?

Witness: He agreed to give me half the profits for finding the money.

Mr. Justice Upington: You were George Stewart & Co. then?—No, my lord, I was not. I am quite willing to account for the work done. Continuing, witness said Stewart was still at the works. Stewart had cancelled the power of attorney. It never occurred to witness to get an irrevocable power of attorney.

Mr. Wilhelm Westhoven, engineer, in the Public Works Department, produced the contract which was entered into with Stewart & Co., and the power of attorney which Carter held for Stewart. The department declined to pay the money to plaintiff on account of a telegram received from the Resident Engineer at the bridge. If an order were made he would have no objection to pay the money to Carter.

The Court made an order authorising the plaintiff to receive all moneys which fall due by the Colonial Government subject to submitting an account to defendant at the conclusion of the work.

[Plaintiff's Attorneys, Messrs. Scanlen and Syfret.]

MCGRATH V. MCGRATH. } 1894. August 1st.

This was an action for restitution of conjugal rights. Mr. Molteno for plaintiff; defendant in default.

Emily McGrath said that her maiden name was Scallan, and she was at present residing at Rondebosch. She was married to her present husband on December 4, 1889, he being a gunner in the Royal Marine Artillery. She was in service at the time, and remained so after her marriage. In September, 1890, her husband obtained his discharge, and obtained work as a labourer. She went to Caledon in 1890, to be confined, and she had one letter from her husband telling her not to return until she had again heard from him. He did not write again, and she last heard of her husband at Wellington in May, 1891, and though she had made every effort to discover his whereabouts since she had failed. The only child of the marriage was a boy, now aged four years.

In answer to the Acting Chief Justice, witness said that her husband went away saying that he would send for her, but he never did so.

Mr. Justice Barry: Did he drink?

Witness: Yes.

The Acting Chief Justice said: The case we had before us last term for restitution of conjugal rights shows the necessity for very strict inquiries being made into all cases of this kind. In such a case of clear collusion the Court had no hesitation in refusing the decree, but the knowledge of collusion came to the Court quite accidentally. We therefore think it necessary that in all these cases very complete inquiries should be made. You make take a decree, the defendant to be ordered to return to or receive plaintiff on or before the 31st December next failing which to show case on or before the 1st February why a decree of divorce shall not be granted, plaintiff to have the custody of the child. Service as before, and one publication in the "Cape Times." On the return day further evidence to be adduced that efforts have been made to find the defendant.

REGINA v. REED. } 1894. August 1st.

Animal diseases.—Glanders—Act 27 of 1893, section 9 — Field-cornet — Obstruction—Landowners—Divisional Council—List—Government approval — Publication in *Gazette*.

B., *the Field-cornet of Port Elizabeth, having received information that one of* R.'s *horses was suffering from glanders, went to* R.'s *house accompanied by two landowners whose names appeared on the list recommended by the Divisional Council in terms of section 9 of Act 27 of* 1893, *but the list had not been approved of by Government, nor had it been published by notice in the Gazette.*

R. *refused to admit them on his premises.*

R. *was summoned in the Resident Magistrate's Court for obstructing* B. *in the execution of his duty, under section 9 of the Act, and fined* £25.

Held on appeal, *that as* B. *had not been accompanied by two qualified landowners within the meaning of the section* R. *had committed no offence in refusing* B. *admittance.*

Conviction accordingly quashed.

This was an appeal from a sentence passed upon the appellant, James Samuel Reed, by the Acting Resident Magistrate of Port Elizabeth.

The appellant was charged with contravening Act 27 of 1893:

1. By wilfully obstructing one Brown, a Field-cornet for Port Elizabeth, and an officer proper under the provisions of section 9 of the Act, in the due performance of his duty by refusing, after demand, to admit him into his (Reed's) premises, the said Brown appearing in his aforesaid capacity together with a Board of persons duly constituted in terms of section 9, Part II., of the Act, for the purpose of inspecting a certain horse belonging to or in the possession of and upon the premises of the said Reed, such horse being suspected as suffering from the disease known as glanders, which disease is by Part II., section 8, of the Act a contagious or infectious disease.

Two other charges of contravening the Act were brought against the appellant, but he was acquitted on them.

The appellant specially pleaded in the Court below that the Act did not operate within the limits of the Municipality of Port Elizabeth, and generally not guilty.

The facts were practically admitted. Brown and two farmers, being landowners, went to Reed's residence on the 31st March last, to inspect a horse belonging to Reed, and suffering from glanders.

Reed refused to admit them, or allow them to inspect the animal.

The two farmers, who accompanied Brown, appeared on the list recommended by the Divisional Council in terms of section 9 of the Act, but there was no evidence to show that the list had been approved of by Government, or that it had been published by notice in the "Gazette."

The appellant was found guilty on the first count, and sentenced to pay a fine of £25, or in default to be imprisoned for two months without hard labour.

From this sentence Reed now appealed.

Mr. Schreiner, Q.C., for the appellant. The law does not give the Field-cornet the power of entry on private premises, it only charges him with the function of inspecting.

The Field-cornet was not accompanied by the required persons to inspect. The former Act of 1881 allowed any two landowners, but the Act of 1898 requires a list to be framed and published in the "Gazette." No such list has been published.

In any case there was no obstruction within the meaning of section 14 of the Act. Mere refusal to admit is not obstruction.

Mr. Giddy for the Crown: The Government took up the position that the list should have been published in the "Gazette" by the Divisional Council. The recommendation of the Divisional Council is final. The reference in section 9 to publication by notice in the "Gazette" is merely directory, it is not imperative.

Reed admits that he knew that Brown was the Field-cornet and that the two landowners were on the list, and his conduct amounted to wilful obstruction.

Mr. Schreiner, Q.C., in reply, cited *Maxwell*, pp. 333—334.

The Court allowed the appeal, and quashed the conviction.

The Acting Chief Justice said: In this case the appellant was charged before the Magistrate with contravening section 9 of Act 27 of 1898, in obstructing a Board wishing to inspect a horse alleged to be diseased with glanders. It seems to me that the Legislature intended to protect the public by requiring that certain qualified persons should inspect animals alleged to be diseased. By the 9th section these persons are to consist of a field-cornet and two landowners, who shall be taken from a list of landowners for each district, as recommended by the Divisional Council, and which list shall be published by a notice in the "Gazette." According to the construction I put upon this section, the Government by this Act is required to appoint or approve of a list of landowners, but they are restricted in their selection of landowners to such persons as are recommended for appointment by the Divisional Council. That seems to me to be the true reading of the section. In the present case the Field-cornet went to the appellant Reed with two landowners, whose names were on the list recommended by the Divisional Council. Now it is admitted, as common cause between the parties, that this list of landowners has never been approved of by the Government, nor published in the "Government Gazette." I would not lay too much stress on the fact of the necessity of publication in the "Government Gazette" if it had been shown that these people had been actually appointed by the Government, and sufficient notice had been given to the appellant of the fact that they had been appointed by the Government. It may be that the publication of the notice in the "Gazette" is desirable and essential, but I think it is essential mainly in this sense—that some notice, either in the "Gazette" or otherwise, must be brought home to the appellant. In this case there was no duly-qualified person entitled under this section to go upon the premises of Reed and inspect his horse, alleged to be diseased with glanders. Under these circumstances, as these persons had no right whatever to go there, Reed could not be convicted of obstructing the Board in the execution of its duty. If the Field-cornet alone had some right to inspect there might be sufficient evidence to show that the Field-cornet had been obstructed in the execution of his duty. But the Act requires that the Field-cornet should not go alone but accompanied by two qualified landowners. In this case the Field-cornet was not accompanied by two qualified landowners appointed by Government, and consequently Reed cannot be convicted of obstructing him. With regard to the other point argued by Mr. Schreiner as to whether there is any proof of obstruction or not, it is unnecessary to enter into it at present. The one ground I have mentioned is sufficient, I think, to quash the conviction. However, all I can say as regards the other point is, that as far as Mr. Schreiner argued the matter, he did not convince my mind that there had not been obstruction. However, it is not necessary to express any opinion on the point, but on the ground that these persons were not qualified to inspect the horse, and that therefore no obstruction has been offered to a duly-qualified Board, the conviction ought to be quashed.

Mr. Justice Barry said: I do not think it necessary to enter into the question whether there is any right to invade these premises by anybody, because the other point is fatal to Mr. Giddy's contention, viz., that there is no proof whatever that this recommendation, or so-called recommendation, by the Divisional Council has been sanctioned by the Government or published. There is no proof that it has been sanctioned. Publication would have been a conclusive proof of that sanction, and in the absence of any evidence of sanction the case must fail and the appellant succeed. I am

strongly inclined to the opinion that that sanction must be conveyed in the form of publication, which undoubtedly there has not taken place in this case.

Mr. Justice Upington concurred.

[Appellant's Attorney. D. Tennant jun.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

Re GAVIN. { 1894. August 1st.

Mr. Molteno applied for the appointment of a *curator bonis* in the estate of John Gavin, formerly of Oudtshoorn and now an inmate of the Valkenberg Lunatic Asylum, with power to realise the land and stock and invest the proceeds for the benefit of the alleged lunatic.

The Acting Chief Justice said: The Court will appoint Mr. Noble Henry O. Gavin as *curator bonis*, subject to his giving security to the satisfaction of the Master and rendering accounts in the usual way.

MOORE V. MOORE.

Mr. Searle, Q.C., on behalf of petitioner, applied for leave to sue *in forma pauperis* in an action for a judicial separation, by reason of her husband's alleged misconduct, and for the custody of the children of the marriage and maintenance, together with forfeiture by her husband of the benefits under their marriage settlement.

Referred to counsel.

MILNE V. MILNE.

Mr. Buchanan applied for a rule *nisi* requiring petitioner's wife to show cause why he shall not be admitted to sue her *in forma pauperis* in an action for divorce, by reason of her alleged adultery.

The Court granted the application, and ordered the rule to be returnable on the 9th.

STRYDOM V. JACOBS'S EXECUTORS. { 1894. August 2nd. „ 3rd.

Prescription — Trust-money — Acknowledgment of debt—Will—Legacy.

S. *at the age of six months or thereabouts became deaf and dumb and remained so during life.*

On the death of her parents in 1872 S. *went to live with* J. *and his wife, and while so living with them* J. *received on her account* £100, *which had been bequeathed to her by her grandparents.*

J. *died in* 1879 *without having paid the* £100 *to* S.

Under J.'s *will his wife was appointed executrix and took out letters of administration, and in an account which she filed with the Master she brought up the* £100 *as a debt due by her husband's estate to* S.

Thereafter in 1881 J.'s *wife, being as she thought on the point of death, wrote an acknowledgment of the debt of* £100 *due to* S., *and handed the acknowledgment to one* B.

J.'s *wife died in* 1892 *without having paid the* £100 *to* S. *but by her will she gave* S. *a legacy of* £100.

After the death of J.'s *wife her executors refused to recognise* S.'s *claim in respect of the debt of* £100 *on the grounds that it was prescribed.*

Held, *in an action against the executors for the debt of* £100 *and for the legacy of* £100, (1) *that prescription had not run as against the first* £100 *inasmuch as it was trust-money, and* (2) *that the legacy of* £100 *was intended to be in discharge of the debt.*

This was an action instituted by Stephanus Petrus Johannes Strydom, in his capacity as *curator ad litem* to Maria Susannah Strydom, against Johannes Isaac Jacobs and Johannes Jacobus Bekker, in their capacity as executors testamentary to the estate of the late Christina Magdalena Jacobs, for the sum of £200. The declaration was in the following terms:

1. The plaintiff is the *curator ad litem* of Maria Susannah Strydom, who was born deaf and dumb, and who is and was incapable of managing her own affairs when the transactions hereinafter referred to took place. The defendants are the executors testamentary of the estate of the late Christina Magdalena Jacobs.

2. During the lifetime of the aforesaid Christina Magdalena Jacobs and her predeceased husband (Michael Cornelius Jacobs), to whom she was married in community of property, Maria Susannah Strydom's parents died, and after their death Maria Susannah Strydom lived with, and under the care and protection of, the said Michael Cornelius Jacobs and his wife (Christina Magdalena Jacobs).

3. During the period that Maria Susannah Strydom was living as aforesaid under the care and protection of Michael Cornelius Jacobs and his wife, there was paid to Michael Cornelius Jacobs for and on behalf of Maria Susannah Strydom the sum of £100, being the amount of inheritance due to the said Maria Susannah Strydom from the estate of her deceased parents.

4. Michael Cornelius Jacobs died in or about the month of December, 1879, without having paid the said sum of £100 to Maria Susannah Strydom, and by his last will and testament his wife, Christina Magdalena Jacobs, was appointed executrix testamentary of his estate, and duly took out letters of administration.

5. Thereafter, on or about the 29th day of July, 1880, the said Christina Magdalena Jacobs took over the debt of £100 due to Maria Susannah Strydom by the estate of Michael Cornelius Jacobs, and became liable for the same.

6. Subsequently, on or about the 7th day of July, 1881, the said Christina Magdalena Jacobs, in her capacity as executrix testamentary of the estate of the late Michael Cornelius Jacobs, filed a liquidation and distribution account with the Master of this honourable Court, in which the said sum of £100 was brought up as a debt due by the estate to Maria Susannah Strydom.

7. Christina Magdalena Jacobs died in or about the month of December, 1892, without having paid Maria Susannah Strydom the said sum of £100.

8. By her last will and testament, dated the 16th day of August, 1889, the said Christina Magdalena Jacobs bequeathed the sum of £100 to Maria Susannah Strydom, and appointed the defendants executors testamentary of her estate, and they thereafter took out letters of administration.

9. It was the duty of the defendants, in their capacity as aforesaid, to have paid to Maria Susannah Strydom the £100, the amount of her inheritance, and the said legacy of £100 out of the estate of Christina Magdalena Jacobs; but although all things have happened, all conditions have been fulfilled, and all times have elapsed to entitle the said Maria Susannah Strydom to payment of the said amounts, the defendants wrongfully and unlawfully refuse to pay the same, or to recognise the claims of the said Maria Susannah Strydom, although frequently requested to do so.

Wherefore the plaintiff claims, in his capacity as aforesaid:

(*a*) Judgment for the sum of £200, as aforesaid, with interest.

(*b*) Alternative relief.

(*c*) Costs of suit.

The defendants filed the following plea:

For a plea to the plaintiff's declaration the defendants say:

1. They admit that Maria Strydom was born deaf and dumb, and that defendants are the executors testamentary to the estate of the late Christina Magdalena Jacobs. They deny the other allegations in paragraph 1.

2. They admit that the parents of Maria Strydom died in the lifetime of the said Christina Jacobs and her husband, Michael Jacobs, married to her in community of property, and that after their death the said Maria Strydom lived with the said Michael Jacobs and his said wife. They deny the other allegations in paragraph 2.

3. As to paragraph 3, they say that the said Maria Strydom lent the sum of £100 to Michael Jacobs while she was living with him. They deny the other allegations therein.

4. They admit the allegations in paragraphs 4, 5, 6, 7, and 8, and say that on or about the 29th July, 1881, the said Maria Strydom accepted an acknowledgment of debt signed by the said Christina Jacobs, in settlement of the said debt.

5. They deny the allegations in paragraph 9, and say that by virtue of Act 6 of 1861 no action can be brought upon the said document, and no claim can be made in respect of the said debt in paragraph 3 of the declaration referred to, seeing that the same is now prescribed.

6. With regard to the £100 in paragraph 8 of the declaration referred to, the said estate is unable to pay the creditors thereof, and the legatees, under the joint will of the said Michael and Christina Jacobs, who are entitled to preference to the said Maria Strydom, the full amount of their claims.

7. There will be a considerable deficiency in the said estate, and, consequently, the defendants neither have, nor will have, any funds in hand wherewith to satisfy the said legacy, or any part thereof.

Wherefore the defendants pray that the plaintiff's claim may be dismissed, with costs to be paid by the said Stephanus Strydom.

The replication was general, and issue was joined on these pleadings.

Mr. Sheil appeared for the plaintiff.

Mr. Searle, Q.C., and Mr. Shippard for the defendants.

The facts of the case are briefly these:

When Maria Strydom was about six months old she became deaf and dumb, and remained so during the rest of her life. At the date of the trial she was about 57 years old.

On the death of Maria Strydom's parents, about the year 1872, she came to live with Mr. and Mrs Jacobs, and during the time she was living with them Jacobs received £100 from the estate of Maria Strydom's grand-parents, being the amount of her inheritance. Jacobs died in December, 1879, without having paid over the amount of her inheritance to Maria Strydom. Prior to the death of Jacobs he and his wife, to whom he was married in community of property, executed a mutual will, by which the survivor was appointed heir of the first dying, who was to remain in possession of the estate during his or her life, and at the death of the survivor, who was also appointed executor, the landed property was to pass to the testators' three sons on condition that they paid to the testators' five daughters, or their representatives, the sum of £1,000 two years after the death of the survivor. Mrs. Jacobs adiated and took out letters of administration. Two of the sons bought out their brother and took transfer of the farms in their father's lifetime, and after his death, they each passed a mortgage bond for £500 in favour of their mother as executrix.

Subsequently one of the brothers became insolvent and the other assigned his estate, the trustee in the former estate and the assignee in the latter paying Mrs. Jacobs £500 each in discharge of the bonds. Mrs. Jacobs paid £500 out of the £1,000 to her daughters or their representatives. On the 29th July, 1880, Mrs. Jacobs, being as she thought on the point of death, gave one Stephanus Bekker an acknowledgment of her debt to Maria Strydom, which was in the following terms:

Klipfontein,
July 29th, 1880.

I, the undersigned Christina Magdalena Jacobs, acknowledge myself to be indebted to Maria Susannah Strydom in the sum of £100 sterling for value received.

C. M. Jacobs.

On the 9th July, 1881, Mrs. Jacobs filed a liquidation account with the Master, in which she brought up the £100 as a debt due to Maria Strydom by the estate.

Thereafter on 16th August, 1889, Mrs. Jacobs executed a will by which she bequeathed to Maria Strydom a legacy of £100, the remainder of her estate she left to her eight heirs in equal shares, and she appointed the present defendants her executors.

Mrs. Jacobs died in December, 1892, and thereafter her executors took out letters of administration.

On the executors' refusal to recognise Maria Strydom's claims the present action was instituted by her uncle, who for that purpose was appointed *curator ad litem* by the Supreme Court on 12th December, 1893.

There was no oral testimony. The evidence was taken on commission, and went to show that although Maria Strydom was not actually of unsound mind, still she was utterly incapable of managing her affairs, or of transacting any business, several of her witnesses deposing that she had no more understanding than a child of five or six years old, and that she had no idea of the value of money.

Some of the witnesses swore that Maria Strydom was intelligent, had a good memory, and was in no way childish in the ordinary acceptation of that term.

Mr. Sheil for the plaintiff: Maria Strydom being deaf and dumb and of weak intellect, her case falls within the exceptions enumerated in section 6 of Act 6 of 1861, and this is so whether she is regarded as being of such unsound mind as to bring her within the section or whether she is regarded as a minor.

The Civil and Dutch authorities who treat of personal incapacity include deaf and dumb persons among minors. *Van Leeuwen's Commentaries* (1, 12, 3); *Grotius* (1, 11, 1 & 2); *Justinian's Inst.* (1, 23, 4). Maria Strydom being in the eyes of the law a minor the Statute does not run as against her.

Again, the first £100 claimed by Maria Strydom is trust money, against which the Statute does not run.

Jacobs received the money from the estate of Maria Strydom's grandparents and he committed a breach of trust, or something in the nature of *dolus*, in not handing it over to Maria Strydom, who is entitled to *restitutio in integrum*. Mrs. Jacobs can be in no better position than her husband, as she took over the debt in 1881 (see Liquidation account, 9th July, 1881). Apart from recognition of the debt Mrs. Jacobs enjoined her sons to see that the money was paid to Maria Strydom after their mother's death. She committed a trust to them which they are bound to fulfil, and the rule of the Roman Law applies. *Ins'*. (2, 23, 12). See *Van der Kessel* (313),

If the Court should hold that the Statute does run, and that there was no breach of trust on the part of Jacobs, then the giving Maria Strydom a legacy of £100 in Mrs. Jacobs's will in 1892 is a sufficient acknowledgment of the debt to take it out of the operation of the Statute.

Mr. Searle, Q.C. (with him Mr: Shippard), for the defendants: If it were intended to exempt deaf and dumb persons from the operation of the Statute special reference would be made to them, as has been done in the case of persons of unsound mind and minors.

The curators of deaf and dumb persons are not to exercise their functions unless it is absolutely necessary. *Voet* (27, 10, 13); *In re Rens* (Foord, 92).

Unless the Court should hold that Maria Strydom is of unsound mind the Statute runs. The evidence shows that Maria Strydom is intelligent and has a good memory, and cannot possibly be said to be of unsound mind.

There was no breach of trust or *dolus* on the part of Jacobs, and if the money was not actually lent to him Maria Strydom knew that it was in his possession.

It is true that the £100 was brought up by Mrs. Jacobs in her liquidation account in 1881, as a debt due to Maria Strydom, but inasmuch as it was not claimed within the period of prescription the Statute has run. The legacy of £100 left to Maria Strydom by Mrs. Jacobs's will cannot be regarded as in satisfaction of the debt, as no intimation was given to Maria Strydom that it was in satisfaction of the debt.

Mr. Justice Upington: The presumption in the English law is, that where a debtor has bequeathed to his creditor a legacy of an equal or greater amount than the debt, the legacy is to be regarded as given in discharge of the debt.

Here the legacy is at variance with the terms of the joint will and cannot be enforced, the daughters as heirs under the joint will have still a claim of £500, and there are not sufficient funds in the estate to satisfy their prior claims. The legacy of £100 in the will of 1889 cannot be regarded as an acknowledgment of the debt. He referred to *Fuller* v. *Redman* (26 Beav., 614).

Mr. Sheil abandoned the claim for the legacy, and judgment was given for the plaintiff for £100 with costs, including the costs on the application for the appointment of the *curator ad litem*.

The Acting Chief Justice, in delivering judgment, said: This is an action brought by Stephanus Petrus Johannes Strydom, as *curator ad litem* of Maria Susannah Strydom. According to the pleadings, which, as has been pointed out already, do not clearly set the facts before the Court, Maria Strydom was born deaf and dumb, but from the evidence I am inclined to the opinion that she was not born deaf and dumb, but that early in life she had an illness from which deafness and dumbness resulted. The evidence before us shows clearly, I think, that Maria Strydom is a person who, if an application had been made at any time to place her under curatorship, would have been found to be incapable of managing her own affairs. The late Mr. and Mrs. Jacobs seem to have acted with great kindness towards Maria Strydom, they took her under their care, and maintained and supported her. While Maria Strydom was with them she became entitled to a legacy of £100 from her deceased grand-parents' estate. This was some thirty years ago or more. This sum was paid over to Mr. Jacobs, and kept by him apparently in the capacity of assumed guardian or curator to this girl. On his death his widow was, in 1880, appointed his executrix. While she was such executrix, and before she had framed her account, Mrs. Jacobs was taken seriously ill. She had acknowledged all through that this sum of £100 belonged to Maria Strydom, and when *in extremis*, as it was believed, she signed a document acknowledging that she was indebted to the girl in this amount. This acknowledgment was handed over to a Mr. Bekker, to keep for the girl. The doctor was of opinion that the woman could not live later than twelve o'clock that night; however, she recovered, and lived for twelve years afterwards. During the next year, Mrs. Jacobs filed her account as executrix of her husband's estate. In this account, she brought up this sum of £100 as being due by her husband's estate to Maria Strydom. The declaration alleges that Mrs. Jacobs took over this debt as a personal debt of hers in July, 1891. This allegation is admitted by the plea, and the plea goes further, and says that Miss Strydom accepted the acknowledgment of debt signed by Christina Jacobs in settlement. In other words, that on the death of the husband, the amount which was brought up in the account as a debt due by him to Miss Strydom and was money he had been administering for Miss Strydon, was taken over as a personal obligation by Mrs. Jacobs. The evidence in support of this is the promissory note or acknowledgment of debt made by Mrs. Jacobs. The evidence shows that Miss Strydom had nothing whatever to say about this change, nor had she any knowledge of the transaction. There was no contract between the parties. Mrs. Jacobs continued the care of Maria Strydom and her money. She stood to

Maria Strydon in the position of a parent, assumed the position of guardian, and managed her affairs. Mrs. Jacobs, in the account she filed with the Master, produced no vouchers for the payment of the debt by her husband's estate. If the account had been filed in the present day the Master would have required either a receipt from Miss Strydom for the amount or he would have insisted on this £100 being paid into the Guardian's Fund. Practically this is an administration suit—a suit brought to require an account of the amount handed over to the guardian of the girl. Mrs. Jacobs has charged the girl nothing for maintenance, perhaps she kept the trifling sum derived from interest, but at all events it was clear that all through Mrs. Jacobs had treated the capital sum as belonging to the girl, and showed by all her acts that she intended to secure the sum to the girl. I think that in putting the legacy in her will she did so to show that she still acknowledged her liability for the debt and that she wished her executors to pay the sum. Mrs. Jacobs continued to act up to her death two year ago as guardian of this girl, and as curator of her money. Under the circumstances, I do not see how it is possible to hold that prescription can apply in this case. That being the case, judgment will be given against her estate for the sum of £100, which Mrs. Jacobs acknowledged as belonging to this girl. As to the sum of £100, the legacy, I do not think judgment can be given for that amount. I do not think it was intended by Mrs. Jacobs to give both a legacy and to repay the debt, but she simply intended by mentioning the amount in her will to secure that this sum of £100 which her husband had received, and which she had taken over, should be repaid to the girl. It has been shown in evidence that the estate is not sufficient to pay all the claims against it. There is a claim against the estate on behalf of the beneficiares under the first will. These beneficiares are not before the Court, but I throw it out for the consideration of the plaintiff whether it is not advisable to come to some agreement by which these claims should be dealt with *pro rata*, as otherwise it is almost inevitable that this estate will be sequestrated and the proceeds dissipated in charges. We cannot give any judgment as to whether the beneficiares under the first will are creditors or merely legatees, but as far as at present advised, it seems to me that they would be entitled to rank on Mrs. Jacobs' estate as creditors and not merely as legatees. The plaintiff is entitled to judgment for £100 and costs, and this will now become a judgment debt against the estate.

Sir Jacob Barry: I concur with the judgment. The evidence satisfies me that Mr. Jacobs during his lifetime assumed the double position of protector of the girl and also trustee of this £100. He behaved well towards this girl in every way. There is no counter-claim for maintenance, and therefore we cannot deal with that. We must therefore deal with the £100 as if it were £100,000. After his death, the evidence also satisfies me that his wife assumed the position of protector to the girl and trustee of this money. Her executors cannot now be heard to say what, I do not think, she would have said during her lifetime, that the debt had been barred by prescription. Her will goes to confirm all this, and for that reason I come to the conclusion that the plaintiff is entitled to this £100. For the same reason I come to the conclusion that the claim for the legacy cannot be sustained.

Mr. Justice Upington: I agree with my brother Barry when he says that if Mrs. Jacobs were living she would never have attempted to say that this debt was barred by prescription.

Judgment was accordingly entered for the plaintiff for £100 with costs, including the costs of the application for the appointment of the *curator ad litem*.

[Plaintiff's Attorneys, Messrs. Sauer & Standen; Defendants' Attorneys, Messs. Van Zyl & Buissinné.]

M'LINGWANA AND HOBBS v. GOLA AND SEKO. | 1894. August 3rd., 6th.

Native Locations—Act 33 of 1892, sections 7, 11, and 13—Conditional lease—Huts—Damages.

In July, 1893, H. *entered into a verbal agreement with certain natives, who had for some years previously occupied a private location on his farm, in terms of which he gave them the right to continue to live on the farm for twelve months at a certain fixed rent, conditional on his being able to obtain the services of a European overseer in terms of the Location Act of* 1892; *failing which the natives were to leave the location at the end of the year.*

H. *failed to obtain a European overseer and notified that fact to the natives in January*, 1894, *telling them at the same time that the location would have to be broken up, and giving them seven days within which to vacate their huts and leave the farm.*

The natives left the farm after their huts had been burnt down by H.'s *instructions.*

Thereafter certain of the natives brought an action for damages against H. *in the Magistrate's Court and judgment was given in their favour.*

On appeal, *the Magistrate's judgment was reversed.*

This was an appeal from a decision of the Assistant Resident Magistrate of East London in an action in which the present appellants, defendants in the Court below, were sued by the present respondents for the sum of £20 damages, by reason, as the summons alleged, of their having wrongfully and unlawfully burned down or destroyed the plaintiffs' huts on or about the 19th January, 1894, thereby compelling plaintiffs and their families to go without shelter, and other damages caused to the plaintiffs amounting to the said sum, for which sum the plaintiffs claimed judgment with costs.

The defendants pleaded the general issue.

The facts are briefly these:

The plaintiffs lived for some years in a private location on the second-named defendant's farm in the district of East London under the tenancy of the first-named defendant who was the headman of the location and who hired the land from Hobbs. In July, 1893, Hobbs, through one of his sons, entered into a verbal agreement with the respondents, in terms of which they were to remain on the farm for twelve months, conditional on Hobbs being able to engage a white overseer in terms of the Location Act of 1892, failing which, the natives were to leave the location at the end of December.

Section 7 of the Native Locations Act, 1892, requires every owner of land on which native location on private property is established to take out an annual licence for such location, and section 11 enacts that no such licence as is referred to in section 7 shall be issued unless there is produced to the officer authorised to issue the same, a certificate signed by the Civil Commissioner of the division or by the field-cornet of the field-cornetcy in which the location to which the licence refers is established, to the effect that the person signing the same is satisfied that the owner of the land, or some European lessee or overseer for such owner, is resident, and has for the six months immediately preceding the date of the certificate been resident upon the farm on which the said location is situated.

And section 13 provides that: Every owner of land on which a native location on private property is established, who shall continue or knowingly allow such location to be continued without taking out his annual licence as aforesaid, shall be liable for every such offence to the penalty set forth in the 6th section of the Native Locations Act, 1884. (£25 for the first offence, and to double the amount of the last inflicted fine or penalty for each subsequent offence.)

As Hobbs did not live on the farm, and had no European overseer, he informed the natives living on the location (through his son) in November, 1893, that there was every probability of the location being closed by the end of the December following, as he could not get a white overseer, and that no licence would be granted unless he succeeded before the end of the year in obtaining an overseer.

Failing to obtain an overseer, Hobbs, jun., acquainted the natives with this fact in the middle of January, 1894, and told them that the location would be broken up, and gave them seven days within which to leave.

Subsequently Hobbs, jun., again saw the natives; told them he could not obtain an overseer; that the location would be broken up and their huts burned, but that they could return with passes and harvest their crops.

The natives removed their effects from the huts, and they were burned.

Afterwards one of the natives instituted an action against the present appellants in the Resident Magistrate's Court, East London, and obtained judgment.

The present action was then instituted, and judgment was given for Gola for £6, being for five huts at £1 each and £1 damages and costs, and for Seko £4, being £3 for huts and £1 damages and costs.

From this judgment the defendants now appealed.

Mr. Schreiner, Q.C., in support of the appeal: Legal compulsion absolves the person who obeys the law from any liability. *Baily* v. *De Crespigny* (L.R., 4 Q.B., 185). See also *Pollock* on *Contracts*. Under section 13 of the Act, Hobbs was liable to a penalty of £25 if he continued the location without a licence.

The natives sustained no damage, the materials of which the huts were made being valueless.

Mr. Rose-Innes, Q.C., for the respondents: At the time Hobbs entered into the agreement he knew he could not carry it out, as he had not secured a white overseer at the end of June. He cannot now protect himself under the Act. In any case the natives were entitled to compensation. *De Beers Consolidated Mines* v. *L. & S. A. Exploration Co.* (3 Sheil, 438).

Mr. Schreiner, Q.C., in reply: If a white overseer had been engaged after July the Government would not have refused to issue a licence.

The Court allowed the appeal.

The Acting Chief Justice, in delivering judgment, said: In this matter one cannot help having considerable sympathy with the respondents, but the question to be decided is one of pure law. The whole case turns upon this question of fact—was this an agreement absolute to let the property to the natives for twelve months from July 1, 1893, or was it a letting subject to the condition that if Hobbs did not provide a white overseer for the location the lease of the property should cease on the 31st December, 1893. Mr. Innes has candidly admitted that if this was so, the ground was cut under the feet of the appellants, and looking at the Magistrate's finding, I think we are forced to the conclusion that this was a lease by Hobbs to the natives for a year, subject to the condition that it should terminate on December 31 if Hobbs was unable to find a white overseer. Hobbs apparently tried to obtain a white overseer, but failed to do so. As a matter of fact he could not, according to the strict letter of the law, have expected to continue the lease after December 31, not having had a white overseer on the property from July 1, but perhaps, as Mr. Schreiner has contended, if he had within a short time found a white overseer the Government would not have been very strict in refusing to renew the licence for the location. If it is held, therefore, that this is a lease subject to a condition and that condition not being fulfilled the lease terminated on December 31, on that date the right of occupation of the respondents on this property ceased, and after that date the title was abandoned by them to the landlord. I think, however, there was more than this. It is sufficient on the evidence to say that there was a consent on the part of the natives to the destruction of these huts. If this had been an action for damages for destruction of property or loss of property by burning, and the Magistrate had had to inquire into the value of the material for which Hobbs had refused to allow, I think damages to that extent might have been given. But using one's own knowledge of what Kafir huts are, we know that the material of a Kafir hut is practically worthless. However, this is not an action for damages at all. The Magistrate seems to have founded the whole of his judgment on this fallacy—that by the sixth section of the Act of 1892 the natives could have claimed reasonable time within which to remain on the *location* and reap their crops after the expiration of the licence. The sixth section, as has already been pointed out, does not apply to this case at all. The question is: Did this lease terminate on December 31? On the Magistrate's finding and on the facts it is clear that it did so terminate. After December 31 the natives left without any protest, though perhaps they were unwilling to leave; and their property was destroyed, practically with their consent, and at all events without their raising any objection. Some of the natives themselves destroyed their huts. This is not an action for damages for the destruction of property, but is an action for not continuing the right of occupation after the expiration of the lease. Under these circumstances, I think the Magistrate was wrong in his decision now appealed against. At the same time I have the greatest sympathy with the natives, who might have been dealt with in a less summary manner by the landlord. The appeal must be allowed with costs.

Mr. Justice Barry: In certain respects it is impossible to congratulate the man who succeeds in this case upon his success. Had he used a certain amount of discretion—and not only discretion, but that sort of conduct one would expect from a landlord in the position in which the appellant is—he would probably have avoided all the consequences of this litigation, which must be very disastrous to the respondents. However, we have to determine the question of law, and not be guided by sympathy. As far as the evidence goes, it would appear that there was this condition attached to the agreement, viz., that a white man should be hired, and if a white man could not be got the natives were to leave. It is quite clear to my mind from the evidence that the natives were aware of this, and consented to it. There is also the further evidence that at the expiration of the year they were informed that they would have to leave, and they then consented to leave. I am not quite prepared to say that under such consent it must not be implied that the contract was that they would leave, but would have time to reap their crops. Now there is some evidence that that was part of the agreement, and it might have been contended that it was an incident to that agreement that the huts should continue. Unfortunately for the respondents, at this very time there was this further statement in evidence that only six huts were to be retained, and we must therefore take the whole of the evidence together, and taking it together, I think the contract between them at that time was that they were to leave and to return to reap the crops, but that meantime only six huts were to be retained. That being the contract

to which they assented, they cannot be heard to say now that that was not the contract. The real history of the case lies in what took place immediately afterwards. Having consented to this, they went and saw a lawyer, and the lawyer told them they had no right to be turned off at all and that they were still tenants, and would remain so until the end of the year. In taking up that position they were wrong, and unfortunately in erring the present consequences follow. I sympathise with them because although they have acted on bad advice, the appellants might under the circumstances have even then prevented litigation and arranged matters with these unfortunate natives.

Mr. Justice Upington concurred.

[Appellants' Attorneys, Messrs. J. & H. Reid & Nephew; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

INDEPENDENT COMPANIONS SOCIETY V. STEMMET. 1894. August 6th.

Benefit Society—Arbitration—Pleadings.

One of the rules of a Benefit Society provided that: Should any question arise which cannot be decided by a reference to these rules, it shall be left to the decision of the Arbitration Committee of members to be elected at the general election of officers; and any member acting contrary to the decision of the arbitrators shall be fined 1s.

In an action brought in a Magistrate's Court by a member of the society against the trustees for sick pay and sick visitor's pay, the defendants did not specifically plead the rule as to arbitration, nor did they except to the Magistrate's jurisdiction. but defended the case on the merits.

Judgment was given in favour of the plaintiff.

Held on appeal, *from the Magistrate's judgment, that inasmuch as the rule as to arbitration was not pleaded or relied upon in the Court below it could not be relied upon in the appellate Court as a bar to the action.*

This was an appeal from a decision of the Resident Magistrate of Cape Town in an action in which the present respondent, plaintiff in the Court below, sued the appellants, defendants, for the sum of £2 7s. 6d., being ten days' sick pay, at 2s. 6d. per diem, two quarters' salary as sick visitor at 7s. 6d. per quarter, and 7s. 6d. as damages, in lieu of one quarter's notice.

The summons alleged:

1. That the plaintiff was a member of the Independent Companions Society, and that the defendants were the trustees of the said society, and the proper persons to represent the society in this action.

2. That the plaintiff in or about the year 1892 duly paid his admission fee and was admitted a member of the said society, and has since that time continued to pay all amounts due and payable by him under the rules and regulations of the said society.

3. That on or about the 25th day of October, 1893, the plaintiff, by reason of sickness, was incapacitated from attending to and performing his daily labour for a period of ten days, as from the 25th October to the 4th November inclusive.

4. That by reason of such sickness he was entitled to receive from the said society the sum of £1 5s., being at the rate of 15s., per week under and by virtue of rule 21 of the said society.

5. That in or about the month of June, 1893, the said society appointed and engaged the plaintiff as sick visitor, agreeing to pay him the sum of 7s. 6d. per quarter for his services.

6. That for such services rendered the plaintiff was entitled to the sum of 15s., as from 27th June to the 31st December, 1893 (as per the account annexed).

7. That inasmuch as on or about the 13th day of September, 1893, the said society wrongfully and unlawfully dismissed the plaintiff from their employment, he claims the sum of 7s. 6d. as damages in lieu of one quarter's notice.

The plaintiff prayed for judgment for the sum of £2 7s. 6d. with costs of suit.

The defendants pleaded specially:

That the plaintiff as a member of the Independent Companions Society was bound by certain rules framed for the better government of the society, and

That by his own wrongful acts and failure to abide by the rules of the society relating to sick members and sick pay, as well as by his wrongful acts and neglect of duty as such sick visitor, and his failure, refusal, and neglect to perform the duties thereof, he forfeited all right to either sick pay or sick visitor's remuneration.

The defendants further pleaded the general issue.

Rule 13 of the rules of the society enacts:

Should any question arise which cannot be decided by a reference to those rules, it shall be left to the decision of the Arbitration Committee of members to be elected at the general election of officers; and any member acting contrary to the decision of the arbitrators shall be fined 1s.

This rule was not pleaded by way of exception to the Magistrate's jurisdiction or otherwise, but the defendant's agent relied upon it in argument.

Rule 25 of the rules of the society is as follows:

Any member whilst in receipt of sick pay shall not be allowed to be seen in any public-house, or any place of amusement, nor in any market-place, nor shall he be allowed to leave his residence, except with the intention of going to the doctor, for which purpose he must have a pass, to extend from eight a.m. to ten a.m. But should the member require a further pass he shall apply to the society for permission, and if permission is granted the time allowed for the member to be out shall be the following:

In summer from five a.m. to nine a.m., then from three to five p.m.

In winter from eight a.m. to five p.m.

Rule 43 was to the following effect:

Should any member at any time and in any way forget the dignity of his manhood, thereby tending to and bringing disgrace on the society, and his conduct be brought to the notice of the president, he shall be summoned to attend the lodge; and should the charge be fully proved against him, he shall be fined 5s. for the first offence, for the second 10s., and for the third offence be expelled from the society.

The case for the defendants was that Stemmet was seen out by a fellow-brother of the lodge (Field) on the morning of the 4th November at 9.25 a.m., he being then on the sick list, and without having the pass referred to in rule 25.

The plaintiff admitted that he met Field on the morning of the 4th November, but he alleged that he had Field's permission, Field being a sick visitor, to be out between nine and ten a.m., that he told Field that he was coming from the doctor, and that on the morning he met Field he told him that he had the doctor's pass to take outdoor exercise. Field denied that he had given the plaintiff permission to be out between nine and ten a.m., and that the plaintiff had told him that he was coming from the doctor, but on the contrary, stated that he had asked the plaintiff if he were coming from the doctor, and that the plaintiff said, "No, I am going to see the doctor to-morrow."

At a special lodge meeting, held on 14th November, 1893, the president fined Stemmet 5s., and declared his sick pay forfeited under rule 43.

As to the claim for sick visitor's pay, the defence was that Stemmet was dismissed from that office on the 13th September, 1893, because he himself was so frequently ill, and because he had not complied with rule 10, which requires the sick visitors shall visit the sick at least twice a week, and report their cases to the society immediately, and make a report at the next lodge night.

The Magistrate gave judgment for the plaintiff for £1 12s. 6d., the following being his reasons:

The evidence about the breaking of rules with regard to sick pay is contradictory, but all things considered, I take it that it seems likely that the plaintiff had in his possession a certificate from Dr. Petersen that he could take outdoor exercise. I cannot find from the evidence that the plaintiff has infringed the rules of the society, and as regards sick pay, I think he is entitled to the amount of £1 5s. which he claims.

As regards sick visitor's pay, I consider that the plaintiff did not fully do his duty, that he was fined for neglect, paid the fines and did not protest, and that he ought to be satisfied with 7s. 6d., one quarter's pay.

Judgment for plaintiff therefore for £1 12s. 6d., with costs.

From this judgment the defendants now appealed.

Mr. Schreiner, Q.C., was heard in support of the appeal, and before discussing the merits relied upon Rule 18, citing in support of his contention the following authorities: *Van der Spuy* v. *Paarl Bank* (7 Juta, 245); *Davies* v. *South British Insurance Company*, (3 Juta, 416), and *Daniel and Company* v. *Siebert and Van Eeden* (9 Juta, 31).

Mr. Justice Upington referred to *Soaer* v. *McGarr* (3 E.D.C., 235).

Mr. Sheil for the respondent. The rule as to arbitration should have been pleaded in the Court below. As to the merits. Even if Stemmet were out without a pass from the society whilst on the sick list in, the absence of a rule as to forfeiture in such case he is entitled to his sick pay. *Aaron* v. *Excelsior Benefit Society* (3 Sheil 192, 10 Juta, 164). See also *Burton* v. *Eyden* (8 Q.B., 295).

The president had no power to forfeit sick pay under Rule 43, the only disentitling rule is the 23rd.*

As to sick visitor's pay the Magistrate found that Stemmet was entitled to something and only gave judgment for one-third of what was claimed. The Court would not disturb the Magistrate's judgment for such a trifling amount.

The Acting Chief Justice, in delivering judgment, said: The plaintiff in this case sued in the Magistrate's Court for two items—one for

* 23. *No member shall be entitled to any benefit from this society through sickness brought on by himself by drunkenness, quarrelling, venereal disease or its effects, or death by suicide.*

sick pay, the other for salary as sick visitor. In reply to this claim four pleas were put in. One plea specially raises the question of the merits; it sets out the fact of the defendant's own conduct, his wrongful acts, his failure to abide by the rules of the society, and his neglect to carry out his duties, and sets these things up as a defence. Defendants then further plead the general issue, waving all technicalities connected therewith. The Magistrate gave judgment for £1 5s., sick pay, and for 7s. 6d., plaintiff's salary as sick visitor. The matter now comes before this Court on appeal, and the appeal has been mainly argued on the grounds that the action ought never to have been brought at all, as the rules of the society require that disputes should be referred to arbitration. Now as it has been frequently pointed out in this Court, any contract or stipulation by which any possible dispute is to be referred to arbitration is not contrary to law. In the cases of *Davies* v. *South British Insurance Company*, *Van der Spuy* v. *The Pearl Bank*, and *Daniel & Co.* v. *Siebert & Van Eeden*, this matter was discussed, and I need only read an extract from this last-mentioned case which gives a short and clear exposition of the law. [His Lordship read the passage in the judgment of the Chief Justice and continued]: I look upon the members of these friendly societies as parties to a contract. They are bound by the rules of the society which they join, but the principle which is mentioned in these cases must be adhered to. If the dispute is brought into the courts, and the society or member wishes to rely on the contract that the matter ought to be referred to arbitration that point must be specifically raised. In this case the defendants clearly waived the necessity of referring the matter to arbitration. They have not taken exception to the proceedings before the Magistrate or pleaded the rule as to arbitration; on the contrary, they have pleaded to the merits and the case has been gone into and tried on the merits. It is too late now, therefore, on appeal, to say that this action could not be brought because the rules of the society provide for arbitration, neither party having relied on this condition. Coming to the merits, I cannot go so far as Mr. Schreiner has gone, and say that the sick pay is forfeited on the breach of the condition. I think sick pay would be stopped immediately after a person refused to comply with the rules of the society; but so far as sick pay is concerned, there is nothing whatever in the rules to show that sick pay earned or accrued before the breach of the rules, shall be forfeited in consequence of any subsequent misconduct on the part of any member of the society. Under all these circumstances, the Magistrate was quite justified in giving judgment for £1 5s. sick pay. As to the sick visitor's salary. I find great difficulty in supporting the Magistrate's finding on that point. I see the Magistrate's reasons state that Stemmet did not fully do his duty, and that he ought to be satisfied with 7s. 6d. It is not a question of whether he ought to be satisfied or not, but has he earned it? It is clear that he has not earned this sick visitor's pay. He was too ill to be able to perform his duty, and the case is not like a question of wages paid to a servant, and which may still be payable in some cases although the servant is not able to do his work. Judgment ought to have been for £1 5s. and costs, instead of £1 12s. 6d. The alteration on appeal is so small that we don't think it would justify the Court in giving appellants their costs, especially as the main ground of appeal was the question of arbritation. The judgment of the Court below will be adhered to, £1 5s. with costs, the appellants to pay the costs of the appeal.

Mr. Schreiner having asked to be heard on the question of costs,

The Acting Chief Justice said: On the first view of the matter I was in favour of disallowing the costs of this appeal, but after consultation with my colleagues the judgment of the Court below will be altered to £1 5s. with costs; and as to the appeal, each party must pay its own costs, both parties having more or less failed in the matter.

Sir Jacob Barry: It is, I think, much to be regretted that the simple issue as to arbitration could not have been raised. As it is, the society has not raised that question in any plea, but they have put on record a good many words all amounting to the general issue, but none of them touching this question. For the reasons given in *Soaer and McGarr* (3 E.D.C., 235), I don't think the general issue covers everything in a magistrate's court summons, and certainly it does not cover a defence of this kind. Upon the other ground, I concur with my brother that judgment must be given for only £1 5s.. and not for the additional 7s. 6d; but inasmuch as the appellant has succeeded though only for a very small sum, I cannot well deprive him of all his costs, and for that reason I think on appeal we can make no order as to costs.

Mr. Justice Upington: I fully concur with Mr. Schreiner that great value is to be attached to the arbitration clause in these rules. It is a great pity that this defence was not taken in the Court below. These societies could not be worked if every little case is to be brought into court and costs heaped upon costs, but the

defence should be taken in the proper forum. The rules of this society appear to be in more than one particular defective, and it would be well if they were revised.

[Appellant's Attorney, D. Tennant, jun; Respondents' Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

LANGFIELD v. WHITTLESEA VILLAGE MANAGEMENT BOARD. 1894. August 7th.

Bye-law—Village Management Board—Act 29 of 1881—Tax—*Ultra vires.*

Section 19 *of Act* 29 *of* 1881 *provides*, inter alia, *that* it shall and may be lawful for every Board of Management to provide for the management and protection of all common pasture lands and the preservation of all vegetation thereon, and the fixing of the number and description of live-stock any inhabitant shall be allowed to keep and depasture thereon or on any part thereof; or to provide for the granting of temporary grazing rights over the said lands to travellers or carriers or other persons frequenting or passing through the said locality, and for the payment of reasonable dues in consideration thereof.

The Village Management Board of W., *wishing to defray the expenses of fencing the commonage from a neighbouring native location, passed a bye-law imposing a tax of* 3d. *per head per month on all cattle allowed to graze on the commonage and belonging to persons entitled to graze cattle on the commonage.*

L., *an erfholder in the village and entitled to run cattle on the commonage, having refused to pay the tax in respect of certain cattle belonging to him, was summoned in the Magistrate's Court for the amount of the tax, and judgment was given against him.*

Held on appeal, *reversing the Magistrate's decision, that the tax could not be imposed, the bye-law being* ultra vires, Barling v The Town Council of Cape Town (Buch. 1875, p. 101) and Prince Albert Board of Management v Jooste and Others (4 Juta, 400) *distinguished.*

This was an appeal from a judgment of the Resident Magistrate of Queen's Town in an action in which the present respondents, plaintiffs in the Court below, sued the appellant (defendant) for the sum of 16s. 6d.

The summons alleged that the defendant had allowed to run and to graze on the village commonage of Whittlesea twenty-two head of cattle and horses during the months of January, February, and March, 1894, for which animals the defendant was under and by virtue of section 3, sub-sections (*a*) and (*c*) of the approved regulations framed by the Board of Management for the village of Whittlesea, bound to pay plaintiffs the sum of 3d. per month for each such animal.

The defendant filed the following plea:

1. The defendant says that the powers of the plaintiffs are conferred or derived from the provisions of Act 29 of 1881, and under the provisions of the said Act they have no power to levy, impose, or fix fees for grazing, and consequently the regulations on that behalf made and published, including the regulation under which the plaintiffs are now proceeding, are *ultra vires* and illegal.

2. That even if the regulations were *intra vires* and legal the proceedings are irregular, and should have been in the form of a criminal prosecution, as provided by section 2 of the commonage and grazing regulations of the Board of Management of Whittlesea.

3. That defendant, before and at the passing of the said regulation, protested against the same, and recorded his protest in writing.

4. General issue.

Wherefore the defendant prays that the plaintiffs' claim may be dismissed with costs.

The plaintiffs, in reply, pleaded as follows:

1. Plaintiffs join issue with defendant on his plea No. 1 in so far as he pleads that the said regulations are *ultra vires.*

2. Defendant's second plea is unintelligible, and consequently bad in law.

3. The plaintiffs are empowered to sue in form of civil action for any sum due to them.

4. That if defendant did protest against the regulation imposing the payment aforesaid, such protest could not avail to enable defendant to escape or evade such payment.

5. The defendant was a party to the said regulation, and has by his acts waived all right to plead that the said regulation is *ultra vires,*

which plaintiffs are ready to verify; the plaintiffs say the regulation has the force of law.

Section III. of the Regulations was in the following terms:

1. Each proprietor or occupier of an erf, being an inhabitant of the village, shall be allowed to keep and depasture on the village commonage the following number and description of stock, viz:

(a) The owner or occupier of each dwelling-house valued for Divisional Council purposes in the sum of £75 and upwards may run on the village commonage ten head of cattle or horses and six sheep (calves or foals under twelve months not to count) *upon payment of threepence* (3d.) *per head of cattle or horses per month or any part of the month.* (Sheep free.)

* * * * * *

(c) The owner or occupier of each suburban allotment or sub-divided portion thereof under separate title deed, valued for Divisional Council purposes in the sum of £75 or upwards, may run as under para (a) with the addition of six head of cattle or horses upon payment of threepence (3d.) *per head per month or any part of the month.*

These regulations were advertised, as having received the approval of the Governor, by Government Notice No. 297, 1893, dated 18th March, 1893.

The defendant was a party to the passing of the regulations in question, which had for their object the raising of funds to fence the commonage lands from the Oxkraal Location, but subsequent to their passing he protested in writing against any tax being levied upon live-stock for the purpose of fencing the boundary between Oxkraal Location and Whittlesea Commonage, but suggested that a tax should be levied on landed property, according to the Divisional Council valuation.

The Magistrate gave judgment for the plaintiffs for the amount claimed with costs.

The following were his reasons:

Section 19, Act 29 of 1881, defines the duties of Village Management Boards. The Board may frame regulations, which shall be submitted to the Governor for approval, or alteration, or amendment, and shall together with such alterations or amendments as the Governor may have seen fit to make therein be published in the "Government Gazette," and shall thenceforth have the force of law. (Section 20.)

Under the 19th section of the Act the Board may, *inter alia*, provide for the management and protection of all common pasture lands and the preservation of all vegetation thereon.

A wire fence has been constructed by the Board dividing the commonage from the Oxkraal Native Location lands, and this is clearly for the protection of the commonage and the preservation of the pasture, &c. The expenditure in connection with this work is a charge on the erfholders. It is a reasonable tax, especially as the Board has not levied any rate under section 16.

The fence has been erected more in the interest of erfholders having cattle on the commonage than other residents.

Under these circumstances I am of opinion that the regulation in question is not *ultra vires*. (*Prince Albert Board of Management* v. *Jooste and Others*, 4 Juta, 400.)

As to defendant's second plea, it seems to me that the Board under the circumstances can elect to proceed either criminally or civilly for the recovery of the tax. Defendant was called upon to pay, and refused, and thereupon the Board sues for the amount due. (*Municipality of Swellendam* v. *Todd*, 1 Ros., 105.)

From this judgment the defendant now appealed.

Mr. Schreiner, Q.C., in support of the appeal: The Magistrate clearly erred as the Board has no powers beyond that given by the Act. No powers of taxation are given by section 19, and therefore the bye-law is *ultra vires*. *Jooste's* case relied on by the Magistrate has no application to the present.

He also cited *Cradock Municipal Commissioners* v. *Du Plessis* (2 E.D.C., 407) and *Villagers of Bredasdorp* v. *Churchwardens of Bredasdorp* (Buch. 1870, p. 64).

Mr. Searle, Q.C., for the respondents: The bye-law is *intra vires*. The question at issue in the present case has been settled in the *Prince Albert* Case (4 Juta, 400). The bye-law is reasonable, and is clearly one which can be framed under the 19th section.

The Court allowed the appeal.

The Acting Chief Justice said: The respondents in this case, the Village Management Board of Whittlesea, are a body taking their powers from Act 29 of 1881. Village Management Boards have restricted powers, not nearly so extensive as Municipal Boards. By the Act of 1881 Village Management Boards may grant licences and take reasonable dues for certain special purposes; but all rates must be levied by the Divisional Council of the district. This Board has not requested the Divisional Council to levy any rates under the 16th section of the Act, but has endeavoured to raise revenue in other ways, one way being to charge every proprietor or occupier of an erf a fee for pasturage on the village common. On reference to the Act 29 of 1881, section 19, it will be seen that the Board has power to provide

for the management and protection of the common pasture lands, and the preservation of the vegetation thereon. But in this case the object of the bye-law is not so much to protect the common as to raise revenue. The section goes on to say that the Board may grant temporary grazing rights to travellers or carriers, and may charge them reasonable dues in consideration thereof, but the section in no way authorises them to levy revenue from the occupiers or erfholders of the village for the use of their own pasture land. I regret that no titles were put in, but looking to the record, the regulation only applies to common pasture land, and consequently I conclude that each erfholder has the right to pasture stock on this land. Great stress has been laid on two cases—*Barling's* and *The Prince Albert Village Management Board*. Both these cases were decided on quite a different principle to the present. The question in dispute was a regulation compelling the registration of dogs, and in the one case the regulation was upheld, as being one framed for a purpose of general utility and to prevent a nuisance, by prohibiting dogs roaming about the streets; and in the other case it was intimated that such a regulation was not *ultra vires*. There the principle was the protection of the inhabitants; here it is raising revenue. Now, it is a clear principle that a tax cannot be imposed on the inhabitants except by clear legislative authority. I fail to see any authority for the regulations now in question, which are therefore *ultra vires*, and the appeal will be allowed.

Mr. Justice Barry: In my opinion a bye-law must be limited by the authority giving the power to create that bye-law, and in making a bye-law an extensive interpretation is not to be given to the Act creating that power. The object of the section which gives the respondents power to make a bye-law is to regulate the use of the commonage—to see that it is not abused; but the object of the present bye-law is to raise revenue. I don't think the raising of revenue can be considered incident to the section of the Act.

Mr. Justice Upington concurred.

[Appellant's Attorneys, Messrs. Scanlen & Syfret; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

NANNUCCI v. WILSON AND CO. } 1894. August 8th.

Landlord and tenant—Defective roof—Damages—Liability.

Where a landlord with knowledge that there was a defect in the roof let certain premises and rain water come through the roof and damaged goods stored on the premises.

Held, *that the landlord was liable for the amount of the damage.*

This was an appeal from a decision of the Resident Magistrate of Cape Town in an action in which the present appellant, plaintiff in the Court below, sued the respondents (defendants) for the sum of £16 13s. 4d., being the rent for the month of May, 1894, of a store in Long-street, Cape Town, hired by the defendants from the plaintiff.

The defendants admitted that the rent was due, but claimed in reconvention the sum of £14 18s. 5d., being the loss of ten cases of brandy damaged by leakage from the roof of the hired premises, and they tendered £1 14s. 11d., being the difference between the rent and the amount of damage alleged to have been sustained.

To the claim in reconvention the plaintiff pleaded as follows:

That damage, if any, is caused by the wilful act or negligence of the defendants, for which the plaintiff is not liable:

1. In the overloading of the store.
2. That damaged goods were put into the store without plaintiff's knowledge.
3. That the goods alleged to be damaged were never shown to the plaintiff.
4. That only gross negligence on the part of the plaintiff would make him liable for the alleged damage.

The facts are briefly these. The defendants, present respondents, in October, 1893, hired certain premises which were to be used as a bonding store, from the plaintiff at a rent of £200 per annum on the understanding that he was to keep the premises in repair. At the time the premises were let there was a depression in the roof of which the plaintiff was aware. During the month of May, 1894, the roof leaked and ten cases of brandy valued at 55s. per case, and belonging to John Lewis & Co., were

damaged and rendered unmerchantable. The defendants, without showing the damaged brandy to the plaintiff, sold it by public auction, and it was bought by John Lewis & Co., for 22s. per case. The expenses in connection with the sale and advertising amounted to £1 8s.

On demand being made for the rent for the month of May the defendants tendered £1 14s. 11d., being the difference between the rent and the amount which the damaged brandy realised. The plaintiff refused the amount tendered and sued the defendants in the Magistrate's Court for the month's rent. The Magistrate gave judgment in favour of the plaintiff for the amount tendered, he to pay costs. The following were the Magistrate's reasons:

The plaintiff sues defendant for £16 13s. 4d., one month's rent of a store in Long-street. Defendants admit the rent to be due, but claim in reconvention £14 18s. 5d. being loss on ten cases of brandy, damaged by leakage through the roof of the store. The defendants plead a tender of £1 4s. 11d., the difference between the rent due and the loss on the brandy. The tender is admitted. Plaintiff replies to the counter-claim that the damage, if any, is caused by the wilful act or negligence of defendants, for which plaintiff is not liable, and enumerates: (1) Overloading of store; (2) damaged goods put into the store without plaintiff's knowledge; (3) that goods alleged to be damaged were never shown to plaintiff; (4) that only gross negligence on plaintiff's part would make him liable for the alleged damage. The leak of the store through the roof is admitted by plaintiff. He admits, in his evidence, that he bought this store about two years ago, when the depression in the roof existed; and in his evidence admits that he knew, and was well aware, of the serious defect in the roof, and of his having placed supports under it. After having had occupation of the store for a few months, Wilson & Co. entered into a lease with plaintiff at £200 a year for one year from November, 1893, with the distinct understanding that plaintiff shall keep the property in a proper state of repair during the occupation by defendants. About April, 1894, it rained heavily, and serious leakage occurred at the depressed part of the roof, and ten cases of brandy, belonging to John Lewis & Co., were rendered unmerchantable in consequence. An architect examined the roof, and the conclusion I come to from his evidence is that the depression caused the leak and that the overloading has nothing to do with it, and further, that the store is not overloaded. The damaged brandy was put up at public auction and sold at a loss of £14 18s. 5d. It would, perhaps, have been a better course to adopt to have called the plaintiff to see the damages and not to have put the brandy up for sale without consulting him, but this would have been an act of courtesy merely, and the fact of their not having done so does not, in my opinion, debar the defendants from charging the loss to the plaintiff. Much has been said about Lewis & Co. buying their own brandy at the sale, and again making a profit on it. I do not know of anything standing in the way of a man buying his own property at a public sale, and if he is fortunate enough to make a profit on the goods, that has nothing to do with the case. Relying greatly on the case, *Bensley* v *Clear* (Buchanan, vol. 8, part 2, page 89), I find as a fact that the leak was caused through a defect in the roof, of which plaintiff was well aware; that he was bound to keep that building in a proper state of repair, which he did not do; and that he is liable to the defendants for the loss on the ten cases of brandy—£14 18s. 5d., and that the defendants owe plaintiff £1 14s. 11d.—the amount tendered. Therefore judgment for plaintiff, £1 14s. 11d., the plaintiff to pay costs.

From this judgment the plaintiff now appealed.

Mr. Schreiner, Q.C., was heard in support of the appeal, and relied on the following authorities: *Bensley* v. *Clear* (8 B., 89); *Stewart & Co* v. *Executors of Staines* (4 Searle, 152); *Alexander* v. *Amstrong* (B. 1879, p. 233); *Wheeler* v. *Van Reenen* (2 Juta, 269).

Mr. Searle, Q.C., for the respondents, was not called upon.

The Court dismissed the appeal.

The Acting Chief Justice, in delivering judgment, said: In this case, Mr. Nannucci, the appellant, sues the respondents, Messrs. Wilson & Sons, for rent. It is admitted that the rent is due, but the defendants have set up a counter claim for damages, to the extent of £14 18s. 5d., damages suffered through a defect in the roof of the premises let, and tender the balance, £1 14s. 11d., making up the total amount claimed by plaintiff. The question which the Magistrate in the Court below had to decide, and which this Court has now to consider, is whether this claim for damages is enforcible against the landlord. The cases of *Bensley* v. *Clear* and *Alexander* v. *Armstrong* have both been relied upon, and I think that the principles of those cases show that where the landlord by the common law is bound to repair, it is necessary, before he is held liable for damages, to show that there was knowledge in the landlord of the defect, or at any rate, from the nature of his occupation, or from the other circumstances, he ought to have known of the defect. In other words, damages can only be brought against the landlord in the case of neligence on his part,

The words used in *Alexander* v. *Armstrong* are as follows: "The lessor's knowledge of the defect, whether express or implied, is an important ingredient in the determination of the question whether he is liable in full damages or not." In this case, not only the common law applies, but there was a special contract at the time of leasing the premises, on the part of the landlord, that he would keep the property in a proper state of repair. It is perfectly clear, therefore, that in this case there is a liability on the part of the landlord to keep his premises in a proper state of repair. I am willing to apply the cases just cited to this case, and to consider whether, as a question of fact, there was any knowlege of a material defect in the landlord, or whether he ought to have had knowledge of it. On the evidence the Magistrate, who also inspected the premises, has decided against the landlord. I am satisfied that his finding is sound, and that there was every opportunity given to the landlord to know of this defect but that he was aware of the state of the roof when he let the premises. He let the premises with the knowledge of this defect in the roof, and moreover bound himself to keep the premises in a proper state of repair. He certainly did not do so. The evidence of Ransome showed that before any lease took place he examined the premises for the landlord and found it would be impossible to keep the premises in repair for any length of time. The evidence of Scott showed that he spoke to Nannucci several times about repairing the roof before the leakage occurred. Nannucci promised to see about it but never went. It is, however, true that in cross-examination Scott says that Nannucci came afterwards when it was actually raining. The master builder who inspected the premises said it was obvious to the most casual observer that the roof was out of repair. In view of this evidence we are bound to hold there was a visible, patent defect in the roof which the lessor knew of, had every opportunity of knowing of, was bound to remedy, and if he did not remedy would be liable for the consequences. Assuming the liability of the landlord to be established, the only other question is to what extent is he liable. The goods damaged were ten cases of brandy, costing originally 55s. This brandy, after being damaged, was sold by public auction for 28s. Messrs. Wilson & Co. paid the difference to the owner of the property, and they now claim to set the amount off against the claim for rent. It has been strongly contended that this amount was far too much. The Magistrate has inquired into the question, and assessed the damages at the sum paid by Wilson. I cannot say this amount is wrong. The brandy was sold by public auction after notice of the damage had been given to the landlord and the sale had been publicly advertised, and after the sale the landlord himself offered to purchase the brandy at only a trifle more than it realised at auction. It appears in the record that during the course of the trial the brandy was offered to the landlord at 55s. Under the circumstances we are not prepared to hold that the damages awarded by the Magistrate were excessive. On the two points on which the case has been argued I am in favour of the respondents, and I do not think it necessary to bear counsel on their side. There is ample evidence in this case to show that there was an obvious defect in the roof of which the landlord knew, and that the amount of damages claimed was actually suffered by the respondents in this case. In my opinion, therefore, the appeal ought to be dismissed with costs.

Mr. Justice Barry: I concur in thinking that the appeal ought to be dismissed with costs. It is quite clear from the evidence that this house had when let a depression in the roof which was a defect, and which would cause a leakage unless that depression was kept watertight, and inasmuch as it was the landlord's special duty to keep it watertight, and a crack was made in the roof which caused the rain to go through and create this damage, it is clear to my mind that he ought to be held liable. Because he had the means of knowing that there would be this crack, and this very fact ought to have induced him to inspect the roof and take measures to keep the water out. He did not do so, and the tenant has suffered damage. It is said that the tenant had an equal knowledge. I don't think he had. In the first place, it was not his duty to go and look, and in the next, there is evidence on the part of the appellant himself to show that the tenant did not actually know it, and although he might have suspected there would be a leakage when heavy rain came, he did not know there would be this leakage, and as soon as the leakage did take place he seems to have sent notice to Nannucci, who, having information of the damage that had been caused, did nothing. After that a sale of the damaged property took place. Whenever a sale takes place under such circumstances it is a prudent course to give notice, and where a man fails to do so, he certainly exposes himself to criticism. There has been abundant criticism in this case. It has not amounted to a charge of fraud, but it has

amounted to an allegation of gross imprudence on the part of the respondents, which under the circumstances would have justified the appellant in obtaining a great reduction in the amount of damages. But on the other hand, where any damage of this kind does arise. it is a very proper course to sell by public auction. and if anything but a sale by public auction had taken place in the circumstances, there would have been impropriety. I cannot think that because these goods were bought at a rather low rate at the public auction therefore it should be said that that is not the measure of damage. The appellant has gone far to show that the measure of damage of that particular sale is not incorrect when after the sale he only offered 30s. for the goods, by that means hoping, I suppose, to derive a benefit himself. The fact that he did so shows that that particular sale by public auction was a very fair means of testing the damages.

Mr. Justice Upington: I am of the same opinion. The only doubt I have had in my mind is whether by our law direct notice of the defect was necessary, or whether the nature of the case is such that the landlord ought to have been on the alert, and had the means of knowing of the defect, and whether in the latter state of circumstances he should not be held liable. In the case of *Hugall* v. *McLean* (53 L.T., 568), it was held in England in the Court of Appeal that although the landlord had means of knowing that is not sufficient. In that case, however, there was an agreement to do inside repairs, and it did not appear that the landlord had power to enter and view the state of the premises. These are very important facts. Here, however, I am satisfied conclusively from the evidence that the landlord was aware of the defect in the roof, and hold therefore that as a fact there is no other course but to find him liable in damages.

[Appellants' Attorney, Gus Trollip; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

STEPHAN BROS. v. ENGELBRECHT. } 1894. Aug. 8th.

Promissory note—Liquidity—Act 43 of 1885, section 5 (*a*)—Magistrate's jurisdiction.

Stephan Brothers *sued* Engelbrecht *in the Magistrate's Court on a promissory note for £62 2s. 6d. made by one* Visser *in favour of one* Smit.

On the back of the note appeared the signatures of Smit *and* Engelbrecht.

The Magistrate granted absolution from the instance on the grounds that the claim was illiquid and beyond his jurisdiction.

On appeal, *the Magistrate's judgment was upheld.*

This was an appeal from a decision of the Resident Magistrate for Clanwilliam in an action in which the present appellants, plaintiffs in the lower Court, sued the respondent, defendant, for the sum of £66, with interest at 6 per cent. from 15th May, 1893, being, as the summons alleged:

1. The amount of a certain promissory note, amounting to £62 2s. 6d., made and signed by one A. F. Visser, dated October 20, 1892, in favour of one Ernest Smit, and endorsed by the said Smit and by the said defendant, of which note the plaintiffs are the legal holders.

2. Or otherwise, that the said Smit was the holder of the said promissory note, and that Smit ceded the same to said defendant, and guaranteed due payment by Visser to him and to all subsequent legal holders. and in token whereof and as surety to the said defendant and to all legal holders, the said Smit endorsed his name on said note and in law his said signature is proof thereof.

3. That the said defendant (Engelbrecht) thereafter. and after the said note had become due and payable, ceded the said note to the said plaintiffs for value received, and thereby intended to guarantee and did guarantee due payment of the said note by himself or the said Visser or Smit.

4. That the said plaintiffs sued the said Visser, the result of which was a *nulla bona* return, that the plaintiffs paid the costs of the said action amounting to £3 17s. 6d., as per taxed bill of costs hereunto annexed.

5. Wherefore the plaintiffs claim from the said defendant the aforesaid sum of £62 2s. 6d., with interest at 6 per cent. from 15th May, 1893, and a further sum of £3 17s. 6d. for costs incurred as stated in paragraph 4.

The note was in the following terms: £62 2s. 6d.

On the 5th March next I, the undersigned, promise to pay Mr. Ernest Smit the sum of £62 2s. 6d. (sixty-two pounds two shillings and sixpence) for value received, with interest at 6 per cent.

A. F. VISSER.

Matjesfontein, 20th October, 1892.

On the back of the note appeared the signatures of E. Smit and S. A. Engelbrecht.

Smit sold the note to Engelbrecht, who handed it to the plaintiffs after the due date.

The judgment was absolution with costs on the grounds of non-jurisdiction.

The following were the Magistrate's reasons: Claim not of a liquid nature, and does not fall either under paragraph (*a*) or (*b*) of section 5 of Act 43 of 1885. It is an illiquid claim for more than £20, not covered by the sections quoted.

Although the defendant's agent did not raise the objection of non-jurisdiction, I was of opinion that I could not exercise a jurisdiction I do not possess.

The plaintiffs now appealed.

Mr. Rose-Innes, Q.C., in support of the appeal: The Magistrate erred, as the document is liquid. The Act does not say that the document must be liquid as between the parties to the action. Cession can take place by mere delivery, writing is not necessary. He referred to *Story on Bills*, section 199. The onus is on the defendant to show that his signature is not an endorsement. The Magistrate might have taken evidence.

Sir Jacob Barry referred to *Wallace* v. *Wood* (3 E.D.C., 211) and *Randall* v. *Lawrence's Trustee* (5 E.D.C., 174).

Mr. Schreiner, Q.C., for the respondent, was not called upon.

The Court dismissed the appeal.

The Acting Chief Justice said: In this case Messrs. Stephan Brothers sued the defendant in the Magistrate's Court for the sum of £62 2s. 6d., alleging that it was due upon a promissory note made by one Smit, and endorsed by him and the defendant. When we come to see the note, we find there is no legal liability on the note as between the parties. This point was evidently seen by the plaintiffs, because in the Magistrate's Court they did not rely alone on the note, but put in an alternative claim to the effect that by agreement between Engelbrecht and Stephan Brothers the former, after the due date of the note, ceded the note to the latter, and guaranteed the payment of the note by the maker. The agreement so pleaded does not appear on the note itself, but must be proved *aliunde*. Mr. Innes admits that this note is not one upon which Stephan Brothers could claim provisional sentence in this Court, but he contends that under the Magistrates' Courts Act this is an action founded upon a promissory note or other liquid document, and consequently within the Magistrate's jurisdiction. The Magistrate's jurisdictions in cases founded on liquid documents extends to the sum of £250, but in case of illiquid claims only to £20. The Magistrate held that as this claim was beyond £20 the matter was out of his jurisdiction. I think the Magistrate was perfectly right. He had before him the decision of the Eastern Districts Court in the case of *Randall* v. *Lawrence's Trustee* and the case of *Wallace* v. *Wood*, and these cases are founded upon the case in the Supreme Court which has been referred to, *Norton* v. *Satchwell* (1 M., 77). Up to the present time no decision overruling or questioning any of these cases has been produced. I have a recollection that the matter was discussed quite recently, and if my memory serves me correctly, these decisions in the Eastern Districts Court were supported. Under these circumstances it is not necessary to do more than state that we abide by the previous decisions. The appeal will be dismissed. This is not an action founded, in the words of the Act, upon a liquid document, but on a special contract, this document being merely part of the evidence of such contract. Of course this decision is given altogether independently of the Bill of Exchange Act, which does not govern this case at all.

Mr. Justice Barry: I think that an endorsement of a promissory note which is not endorsed by the payee is evidence of suretyship. But in the cases alluded to it was held that where there was no liquid liability apparent upon the promissory note the magistrate's jurisdiction was limited to £20. I think in the present case this endorsement may be evidence of something; it may be evidence of suretyship or of some special contract, and I think it is evidence of something, but the question is, what is it proof of? I think it is certainly not proof of a liquid liability in the nature of the liability sued upon, and we cannot now tell what it is proof of. And as to extraneous evidence, the law does not allow the Magistrate to go into that in order to interpret the meaning of an endorsement not in itself an acknowledgment of the debt. For that reason I think the Magistrate was right, and the appeal must be dismissed with costs.

Mr. Justice Upington concurred.

[Appellants' Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorney, W. E. Moore.]

METELERKAMP'S EXECUTOR v. LANDMAN. | 1894. August 9th.

Provisional sentence—Promissory note—Want of consideration.

L. *was indebted to the estate of* M. *in the sum of* £176 2*s.* 9*d.*, *and on demand being made for payment asked for an extension of time within which to borrow the money.*

An extension of three months was given and L. *passed his promissory note for the amount of the debt in favour of the executor payable three months after date.*

The executor's agent charged L. *a commission of 4½ per cent. on the amount of the claim, and* L. *signed a promissory note for* £7 1*s. in favour of the agent, payable on the same date as the note for* £176 2*s.* 9*d.*

The agent endorsed the note for £7 1*s. in blank, and the notes not being paid on the due dates, the executor as the legal holder claimed provisional sentence on both.*

The Court refused provisional sentence on the note for £7 1*s. on the ground that the agent had given no consideration for it.*

Provisional sentence was prayed on the two following promissory notes:

Humansdorp,
July 17th, 1893.

£176 2*s.* 9*d.*

Three months after date hereof I promise to pay the Executor of the Estate of the late W. S. G. Metelerkamp or order the sum of one hundred and seventy-six pounds two shillings and nine-pence sterling for value received.

I. C. Landman.

£7 1*s.* 0*d.*

Humansdorp,
July 17th, 1893.

Three months after date hereof I promise to pay A. Dyason or order seven pounds one shilling sterling (£7 1*s.* 0*d.*) *for value received.*

I. C. Landman.

Endorsed: A. Dyason.

The defendant opposed the granting of provisional sentence, and filed an affidavit in which he alleged that in July, 1893, he received a letter of demand from Mr. A. Dyason in respect of a debt said to be owing by him (defendant) to Metelerkamp's estate.

That he thereupon went to Mr. Dyason's office and asked him to explain the letter and to tell him what the debt was for. That Dyason told him he could not give him any particulars then, but that the executor was anxious to settle the estate and said if he (defendant) would sign a paper, which he would write, he would procure the defendant a specified account, and if it was found that defendant did not owe so much as the amount claimed he would only be required to pay what he truly owed the estate.

That he signed the note payable to the executor on the fair understanding and in the belief and trust that he was liable thereon only for whatever amount he justly owed to the estate, and that such amount should be ascertained by rendering a specified account of the transactions between the late Metelerkamp and himself on which the claim was said to be founded.

That no account or particulars had ever been tendered to him either by the late Metelerkamp or by the executor or by Dyason.

That he had received no consideration for the promissory note of £176 2s. 9d., now sued upon, and that he believed that if a true statement of account were rendered it would be shown that his indebtedness to the estate would not exceed £20.

Finally he alleged that he never received any consideration for the promissory note payable to Dyason (£7 1s.), nor did he owe Dyason or the executor or the estate anything in respect of the said note.

When the first promissory note was given the defendant owed the estate £176 2s. 9d., on an open account, some of the items of which extended back to the year 1874 and were prescribed.

The promissory note for £7 1s., of which the plaintiff was the legal holder, was given, according to Mr. Dyason's affidavit, in consideration of the defendant receiving an extension of three months, within which time he hoped to be able to borrow sufficient money to pay the claim of £176 2s. 9d., due to the estate, and as Dyason's commission of four and a half per cent. on that amount for collection.

Both Dyason and the executor denied that the defendant had disputed his liability or claimed a detailed account.

Mr. Rose-Innes, Q.C. moved.

Mr. Searle, Q.C., for the defendant.

The Court granted provisional sentence on the first promissory note.

The Acting Chief Justice said: The defence set up in this case is practically want of consideration. Other circumstances have been stated which, if they amount to a defence, must involve a charge of fraud. There is not sufficient evidence in the case to establish fraud. A considerable amount of suspicion is thrown on the circumstances by the taking of this note for £7 1s., but there was no fraud. The question remains, "Has there been consideration?" With regard to the note for £176 2s. 9d., it appears that the defendant owed the estate something, and there is no doubt when this note was given the greater part of the defendant's debts were prescribed. But the defendant has received an account showing £176 2s. 9d. due at the time he signed the note. This account he did not then dispute but acknowledged his liability in writing, thus doing away with any question of prescription; and he cannot be heard now to say that

there was no consideration for that note. As to the £7 1s., there was clearly no consideration. Provisional sentence for £176 2s. 9d. will be granted, with costs.

Mr. Justice Barry: I concur. I think the defence is really one of fraud, but there is consideration proved in regard to the note for £176 2s. 9d. In the case of the note for £7 1s., the circumstances go to show that if the promissory note had been made out properly it ought to have been made out to Metelerkamp's estate, because it was Metelerkamp's estate which gave time and consideration for the note. It is now said it was Dyason's note. He gave no consideration for the note, and I don't think we ought to give judgment for the £7 1s., but if the plaintiff chooses to sue for it in the principal case let him do so. It is a fortunate thing we have to give provisional sentence in this case. I don't mean to say the defendant may not possibly prove hereafter in the principal case that there was a fraud, and that he is only bound to pay the small amount of £20, but if he does not there will be a great deal of expense incurred in that litigation on the part of a man who has apparently no money, and who, if he fails, will probably land the estate in the unfortunate position of having to pay a large bill of costs which cannot be recovered from the defendant.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

Ex parte HERMAN.—*In re* KRUL'S ESTATE. 1894. August 9th.

Bond—Cancellation.

Where for thirty years no interest had been paid on a bond, and there was strong presumption that the amount of the bond had been paid, the Court granted a rule calling upon all persons interested to show cause why the entry in the Debt Register should not be cancelled.

This was the petition of Spacie Safina Herman, formerly widow of the late Marthinus Krul, now married out of community of property to Frans Herman, of Stellenbosch.

The petitioner was formerly married to Krul in community of property, but after his death in 1866 she married her present husband out of community.

Krul was possessed of certain landed property in Stellenbosch, which he mortgaged on 7th May, 1860 to one Adriaan Bouwer as security for the payment of the sum of £300.

Subsequently Bouwer ceded the bond to the Rev. Paulus Daniel Luckhoff.

Thereafter Bouwer married one of Krul's and petitioner's daughters, and subsequent to the marriage he made a donation to his parents-in-law by paying off on their account the bond ceded to Luckhoff.

Bouwer and Luckhoff are both now dead.

Krul died on the 23rd April, 1866, and on the 10th April, 1894, the petitioner was in terms of the mutual will of Krul and herself appointed and received letters of administration as executrix of Krul's estate.

The petitioner alleged that she had caused diligent search to be made for the bond but was unable to find it, and that no interest had been paid on the bond for a period of about thirty years.

The prayer was for cancellation of the entry in the Debt Register.

The matter was before the Registrar of Deeds, but he refused to cancel the entry, as the 35th and following rules of the office had not been complied with.

Mr. Watermeyer was heard in support of the application.

The Acting Chief Justice said: In this case there is no evidence given by the holder of the bond that it had been paid, but only a statement as to what was done with it by the holder who is now deceased. It is true that the length of time which has elapsed is strongly in favour of the presumption of payment, but I think some notice must be given. The Court will grant a rule *nisi*, calling upon all persons interested to show cause, within six weeks of the date of publication, why the bond should not be cancelled, and if no objections be raised, the rule to become absolute without further application. One publication in the "Gazette."

[Petitioner's Attorney, G. Montgomery-Walker.]

Ex parte LOOTS AND WIFE. 1894. August 9th.

Post-nuptial contract—Registration.

Where a post-nuptial contract had been registered in ignorance of the facts that the contracting parties who had intended to exclude community were married at the date of its execution, the Court ordered the contract as registered to have the effect of an ante-nuptial contract, saving the rights of creditors who became such prior to the date of registration.

This was the petition of one Loots and wife.

The petitioners were married at Prieska on 2nd July, 1894. Prior to the marriage, on 30th June, 1894. they executed a power of attorney empowering an agent to appear before a notary in Cape Town and execute on their behalf a marriage contract.

The power of attorney was drawn up by one Van Breda (who was not a lawyer) and was forwarded by him on 2nd July to a notary in Cape Town, with instructions to execute and register the contract.

Van Breda was not aware that such a contract had to be executed prior to marriage, and in instructing the notary he did not state that the marriage had taken place when he wrote, or was about to take place on the day that he wrote.

The notary had the contract prepared and it was executed before him on the 6th July, 1894, and was registered by him on the following 10th July, all in ignorance of the fact that the marriage had taken place on the 2nd July.

The petitioners alleged that they were now in the unfortunate position that although prior to marriage they had executed a power of attorney to enable a contract to be passed, yet, owing to lack of knowledge on the part of Van Breda, they had been married in community without their knowledge or approval.

Being desirous of rectifying the mistake which had been made, they prayed for authority to enter into a fresh contract, which would have the effect of placing them in the position in which they would have been had the contract been duly executed before their marriage, and for authority to the Registrar of Deeds to register such contract.

Mr. Watermeyer was heard in support of the petition and relied on **Schoombie* v. *Schoombie's Trustees* (5 Juta, 189).

The Court ordered the contract as registered to have the effect of an ante-nuptial contract, saving the rights of creditors who became such before 10th July, 1894. †

[Petitioners' Attorney, G. Montgomery-Walker.]

HERTZOG V. WOEST'S ESTATE.

Mr. Watermeyer moved for provisional sentence on a mortgage bond for £1,500, with interest at 6 per cent. from 1st January, 1894.

Provisional sentence granted and property declared executable.

BUDLER V. JEPPE AND ANOTHER.

Mr. Buchanan moved for provisional sentence on a promissory note for £48 13s. 7d, with interest.

Granted.

Ex parte PORTER.

On motion from the Bar, the estate of Philip John Porter was released from sequestration.

IN THE MATTER OF THE MINOR MICHAEL H. C. LOUBSER.

Application was made in this case for authority to the Master of the Supreme Court to pay out to the tutor dative of the said minor, from the amount to his credit in the Guardians' Fund, a yearly allowance in aid of his maintenance and education.

Mr. Tredgold moved.

The case was ordered to stand over for the Master's report.

IN THE MATTER OF THE MINORS MEURANT.

This was an application for authority to the tutrix dative to sell the minors' share in certain landed property in the districts of Stockenstrom and Fort Beaufort inherited from their father's estate, the said property having deteriorated through wear and tear, and it being to the interest of the minors that it should be sold, and the proceeds invested.

Mr. Buchanan moved.

An order was made in accordance with the Master's report, costs of the application to come out of the fund.

IN THE MATTER OF THE MINORS MORONEY.

Application was made for authority to the Master of the Supreme Court to pay out from the amount to the credit of the said minors in the Guardians' Fund an allowance in aid of their maintenance and support, and to satisfy certain expenses already incurred on their behalf.

Mr. Currey moved.

Order granted in accordance with the Master's report.

THE PETITION OF FRANCES M. WILSON MOORE.

Mr. Searle, Q.C., applied for a rule *nisi* requiring petitioner's husband to show cause why she shall not be admitted to sue him *in forma*

---

* See also: *Twentyman* v. *Hewitt* (1 M., 156).
In re Moolman (1 Juta, 25).
In re Purchase (3 Juta, 84).
Ex parte Fricker (2 Sheil, 312).
Ex parte Steele (3 Sheil, 253).
Ex parte Van der Spuy (4 Sheil, 4).—*Rep.*

† Was this application necessary seeing that the power of attorney was executed prior to the marriage?—*Rep.*

pauperis by edictal citation in an action for a judicial separation, custody of the children, maintenance, and forfeiture of benefits under the marriage settlement.

The Court granted a rule *nisi*; personal service to be effected on the defendant.

MILNE V. MILNE.

Mr. Buchanan applied to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against his wife for divorce, by reason of his alleged adultery.

The application was granted; personal service to be effected.

THE MERCANTILE CORPORATION OF THE UNITED STATES AND SOUTH AFRICA.

Mr. Searle, Q.C., presented and applied for confirmation of the report of the liquidator appointed to wind up the affairs of the company by resolution of the directors duly confirmed at a special meeting of members thereof, and for an order settling the remuneration to be allowed to the liquidator.

The Court received the report, and ordered it to be filed, as was done in the case of the *Horo Concession Company* (3 Sheil, 208).

IN THE ESTATE OF THE LATE JOSEPH SAGE.

Mr. Buchanan applied for leave to the executrix testamentary to raise a loan on security of certain landed property belonging to the estate situated in the district of East London, for the purpose of satisfying certain debts.

The application was granted.

SWEMMER V. CALITZ.

This was an application for an order authorising the attachment and sale in execution of all right and title accruing to the respondent to certain inheritance out of the estate of his late father-in-law, Johannes P. Grundeling, in satisfaction of certain judgment obtained by applicant in the Court of the Resident Magistrate for Oudtshoorn, in respect of which there are no other attachable assets.

Mr. Searle, Q.C., moved.

The order was granted, with costs of the application.

Ex parte KEYTEL.

In this matter Mr. Tredgold was appointed *curator ad litem* of the minor, and the matter was referred to counsel.

Re INSOLVENT ESTATE WODEHOUSE.

In this matter Mr. Jno. Charles Blakeway was appointed provisional trustee.

Mr. Tredgold moved.

Ex parte VAN DER RIET AND GOODWIN.—*Re* AMES'S INSOLVENT ESTATE.

This was the petition of Thomas Francis Barry van der Riet and George Charles Goodwin.

The petition set forth that at the second meeting of creditors in the insolvent estate of Walter James Ames, held before the Resident Magistrate of Albany on the 16th May last, two creditors, whose claims together amouted to £238 3s. 7d., voted for the appointment of the first petitioner as sole trustee, and seven creditors whose claims amounted to only £151 15s. 11d., voted for Goodwin as sole trustee of the said estate, in consequence of which there was no election.

That the said meeting of creditors had agreed to the appointment of the petitioners as joint trustees of the estate, the assets of which, as stated in the schedules, consist almost entirely of outstanding debts.

The prayer was that the petitioners might be appointed joint provisional trustees of the estate, with full power to finally liquidate and administer the same.

Mr. Sheil was heard in support of the petition.

The Court granted an order authorising the Master to call a meeting for the election of a trustee.

TREVASKIS V. DE VOS. { 1894. August 9th.

Growing crop—Destruction—Damages.

H., *the lessee of certain land, sold a growing crop of cabbages to* T. *on the understanding that the crop was to remain in the ground during the continuance of* H.'s *lease.*

Before the cabbages were fit for use H. *abandoned his lease and* De V. *took possession of the land as new lessee.*

De V. *failing to arrive at an understanding with* T. *with regard to the cabbages, gave him notice to remove them within nine days, and as they were not removed within that time* De V. *uprooted the cabbages and threw them away.*

T. *thereupon brought an action for damages against* De V. *in the Magistrate's Court and judgment was given for the defendant on*

the grounds that whatever claim T. *had against* H. *he had none as against* De V.

On appeal *the Magistrate's judgment was upheld.*

This was an appeal from the decision of the Resident Magistrate of Carnarvon in an action in which the present appellant, plaintiff in the court below, sued the respondent (defendant) for the sum of £5, damages sustained, as the summons alleged, by the plaintiff in that the defendant did on or about the 15th day of June last, and at Carnarvon, wrongfully, wilfully, and unlawfully destroy certain cabbages and cauliflowers, the property of the plaintiff, which were cultivated in a garden the property of defendant, and which the said defendant had undertaken to allow to grow in the garden, and not to disturb until the said cabbages and cauliflowers should have become fit for use, and to deliver them to the plaintiff, and not to interfere with the plaintiff's right to and in the said cabbages and cauliflowers.

The defendant excepted to the action on the grounds:

1. That the title to ground was in dispute.
2. That the right to the cabbages was in dispute.

The plaintiff admitted that he did not claim the ground, and that it might belong to A, B, or C, but alleged that he merely claimed damages to his cabbages and cauliflowers.

The Court ruled that the right of title or rights in future were not involved in the action, that the right in the cabbages and cauliflowers was what the Court was called upon to decide, and that that was a fit question for the decision of the Court.

The defendant then pleaded a general denial of liability.

The facts are these. One Holland, formerly gaoler at Carnarvon, hired a certain garden in Carnarvon for the year expiring on the 30th October, 1894, at an annual rental of £1. During the existence of the lease the garden was sold to the Rhenish Mission Society, subject to the condition that Holland was to remain in possession until the expiration of his lease, and to pay the society the £1 rent.

The society subsequently, about the beginning of May, sold the garden to one Horn, who again leased it on 7th May to the defendant for the sum of £2 10s., the defendant to have delivery and use of the garden from the society.

On his applying for it the society could not give possession as Holland's lease was still running. Holland, on 15th May, sold certain cabbages, the subject of the present action, to the plaintiff for 10s., under condition that the cabbages should remain in the ground during the continuance of Holland's lease.

Holland left Carnarvon on 2nd June, but prior to his departure, he endeavoured to obtain an extension of his lease to 30th November, so that he could reap a crop of oats which he had sown, and which he calculated would become ripe about that date.

To this the society would not consent, as they were already being pressed by the defendant for not delivering up the garden in terms of agreement with Horn.

Holland finding that he could not get an extension of the lease, then asked if he waived all further claim to the garden, and delivered it to the society as it then stood, or with its contents, the society would consent to forego the rent which had already accrued, and was still to accrue. To this the society consented, after first consulting and stipulating with the defendant that in consideration of his obtaining the garden, as it then stood, with the crops therein including the oats, he would pay to Horn the sum of 10s., and allow his rent to date from 1st May. Subsequently Horn ratified this agreement, and released the society from any further obligation to him.

After the agreement was concluded Holland suddenly remembered the conditions under which he had sold the cabbages to plaintiff, and asked the defendant to deliver the cabbages to the plaintiff.

The defendant promised to do so.

According to the plaintiff's evidence, on the afternoon of the day on which Holland left Carnarvon the defendant came to plaintiff's workshop and said to him, "These cabbages in my garden are yours. I shall water them for you if you will give me some." Subsequently the defendant came to the plaintiff again and gave him notice to remove the cabbages within eight days.

On 13th June following the defendant returned to the plaintiff and said to him, "The nine days are over, what are you going to do with the cabbages?"

Plaintiff told him to do his best (meaning his worst), as he (plaintiff) was not going to do anything with the cabbages.

The defendant subsequently uprooted the cabbages and threw them over the wall.

The defendant, in his evidence, denied that he had promised to water the cabbages if he got some of them, and alleged that the promise he made to Holland was merely to deliver the cabbages to the plaintiff.

The Magistrate held that there was no contract between the plaintiff and the defendant,

and that whatever claim the former might have against Holland he had none as against De Vos, and consequently gave judgment for the defendant, but refused him his costs, on the grounds that he had not spoken the truth in denying that he had promised to water the cabbages if he got some of them.

From this judgment the plaintiff now appealed.

Mr. Searle, Q.C., was heard in support of the appeal.

Mr. Sheil for the respondent.

The Court dismissed the appeal.

The Acting Chief Justice, in giving judgment, said: I think it is greatly to be regretted that these parties have brought this case before the Court on appeal. There is no principle whatever involved in the dispute, it raises no point of law, and there was no reason why the parties should not have abided by the decision of the Magistrate in a trumpery case of this kind. The whole thing has arisen out of the sale of certain cabbages, for which, in the first instance, 10s. were paid. Holland, the lessee of a garden, sold these cabbages to the plaintiff. Holland afterwards for a good consideration, surrendered possession of the garden as it stood at the time Plaintiff did not know this. Trevaskis thought that when Holland gave up the lease he still retained the right which he had bought from Holland. Defendant, who became lessee from the purchaser of the property, took over the garden with all that was in it, and in consideration agreed to pay a much higher rate than Holland had been paying. Holland paid £1, defendant agreed to pay £2 10s. Holland told him afterwards to let plaintiff have the cabbages, and De Vos was quite willing to do so, but when he went to see plaintiff the latter would not come to terms. There was no obligation whatever in the original agreement between defendant and Holland implying that defendant should allow the cabbages to remain. He gave the plaintiff ample time, nine days, to remove them, and as they were not removed he rooted them up and threw them away. There is no contract of any kind upon which to base this action. The Magistrate, I think, was perfectly correct in his judgment, and the appeal must be dismissed with costs,

Mr. Justice Barry: I concur in thinking that the Magistrate was perfectly right. It was a fitting case for the Magistrate to decide, and he has decided it very properly. Assuming that there was a contract between plaintiff and Holland entitling plaintiff to leave his cabbages in his garden until 31st October, it gives no right against De Vos, who afterwards became lessee. The Magistrate held that no contract was proved. The utmost that was proved was a promise to water the cabbages. Perhaps the defendant exercised his powers rather unduly, but the Magistrate took cognisance of that by disallowing him his costs. In doing so I think the Magistrate did all that the present appellant could possibly expect.

Mr. Justice Upington concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Reitz & Herold.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

ROBINSON v. ROBINSON. { 1894. August 10th.

Adultery—Connivance—Divorce—Partnership—Dissolution.

R. *suspecting that her husband had been unfaithful to her, instructed her attorneys to employ a private detective to watch his movements.*

The attorneys employed a detective and gave him instructions to watch and report if R.'s *husband went to a house of ill-fame.*

The detective exceeded his instructions and prompted a prostitute whom he knew to accost R.'s *husband. The prostitute did so and* R.'s *husband committed adultery with her.*

Held, *in an action for divorce instituted by* R. *against her husband, that the conduct of the detective did not amount to connivance on the part of* R.

A partnership to carry on a hotel business existing between R. *and her husband dissolved by order of Court on a decree of divorce being granted.*

This was an action for divorce, instituted by Mrs. Anna Margaretha Robinson (born Erasmus) against her husband, Isaac Robinson, on the grounds of his adultery.

The parties to the suit live at Carnarvon.

The declaration alleged that the plaintiff and defendant were married in or about the 24th

September, 1885, without community of property, and that the marriage was still of full legal force and effect.

That in or about March, 1893, and at Carnarvon, the defendant committed adultery with one Hannah Banka, and on or about 22nd April, 1894, he committed adultery at Port Elizabeth with one Annie Clifford.

That on or about the 9th April, 1894, the plaintiff entered into an agreement of partnership with the defendant for the purpose of carrying on a hotel business at Carnarvon for two years, but that by reason of the misconduct of the defendant, as above alleged, it was impossible to carry out the terms of the said agreement, and plaintiff was desirous of having the same cancelled and set aside.

The plaintiff claimed:

(*a*) A decree of divorce.

(*b*) Forfeiture of every benefit derived by or accruing to the defendant by virtue of the marriage.

(*c*) That the deed of partnership may be cancelled and set aside.

(*d*) Such alternative relief as may seem meet, with costs of suit.

The defendant in his plea denied having committed adultery with Hannah Banka, and admitted having committed adultery with Annie Clifford, but said in respect of the act of adultery with the last named, that it was consented to and procured by means of a collusive agreement between the plaintiff and others, having for its object the commission of adultery by the defendant.

The defendant admitted the partnership, but denied that it was impossible to carry out the terms of the agreement.

Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Sheil appeared for the plaintiff.

Mr. Joubert for the defendant.

Mr. Norman Lacy, of the Colonial Office, produced the duplicate original marriage certificate.

Mrs. Anna Margaretha Robinson deposed: The defendant and I were married on September 24, 1885. I was then fifteen years old. We were married without community. The defendant had nothing except a little furniture. I first heard rumours of my husband's infidelity in November, 1893, but it was only in April, 1894, that I received reliable information on the subject. I have never, as stated in the plea, connived at my husband's adultery, and never knew about it until April last. I purchased the hotel at Carnarvon with £1,000, the proceeds of an insurance on a house of mine in Aberdeen which was burnt down. There is still a bond on the hotel for about £800. I have incurred a liability of about £300 on my husband's behalf, having accepted bills in order to compromise with his creditors. I have paid off part of that sum, viz., about £133, and I am still liable for the balance.

Cross-examined: We lived fairly happily together until 1892, when we had a few tiffs, followed in the following year by a big row owing to rumours which I had heard from servants about my husband's conduct. We afterwards made up the row, and lived on happily until January last, when I took away a general power of attorney in favour of my husband. After this power was revoked, my husband went away to Port Elizabeth. I knew that he was going, but was not aware of the precise date until I saw him packing up. Witness wished the Court to understand that she entered into the partnership against her will, and her only reason for doing so was to induce her husband to obtain a renewal of the hotel licence, which he had threatened not to apply for. She claimed the property at Carnarvon.

Re-examined: Her husband was not a man who devoted much time or attention to business. Witness was now aged twenty-four, and was married at fifteen.

By the Court: Since April Mr. Robinson had divided his time between Port Elizabeth and Carnarvon. When in Carnarvon he lived in the hotel, but occupied a separate room.

Samuel Jacobus van der Walt said that in 1892 and 1893, he was barman at the Carnarvon Hotel. He knew Hannah Banka as a frequent visitor to the hotel—mostly to the canteen. She was a woman of bad character. He saw her on one occasion with Mr. Robinson in a room used for the storage of forage and witnessed their misconduct. He promised to say nothing about it at Mr. Robinson's request, but in April this year informed Mrs. Robinson's attorney.

Cross-examined: He was Mrs. Robinson's cousin, and was on friendly but not intimate terms with her. He was still in her employ as barman at the canteen. He remembered giving evidence on one occasion before the Magistrate at Carnarvon, when the Magistrate told him that he would not believe a word of the evidence which he had given on oath. He had been taken back into Mrs. Robinson's employment since it was known that he had evidence to offer in the present case.

Piet Beest stated that he knew Hannah Banka, who was a vagabond of no occupation. He was boots at the Carnarvon Hotel. On one occasion, during the evening, he found Banka

in one of the hotel bedrooms, sitting on the bed. His master was present at the time.

Cross-examined: He was in Mrs. Robinson's employ now, at the hotel.

Michael Joseph Daly, assistant messenger at the Magistrate's Court, Port Elizabeth, said that in April last he received instructions from a firm of attorneys to watch Mr. Robinson. He knew a woman called Annie Clifford—rejoicing in the name of "Cock-eyed Annie"—she was a woman of bad character. He saw Mr. Robinson one night in Port Elizabeth and suggested to Annie Clifford that she should accost Robinson. She did so, and he afterwards saw Clifford and a man going towards her house, but he could not swear positively to his identity. He followed the pair to the woman's house, where he saw them in the act of adultery by looking through a broken pane of glass in the window. He did not wait to see the man leave the house as he was afraid of Clifford's dog. The date of this occurrence was the 21st April.

Cross-examined: He was instructed by the attorneys to watch Robinson and see if he went to a house of ill-fame. He told Annie Clifford to speak to Robinson, with the object of trapping him.

Re-examined: He had not been instructed by the attorneys to trap Robinson.

Isaac Robinson, the defendant, was called, and denied having committed adultery at any time with the woman Banka. Van der Walt's evidence was an utter fabrication. The witness Beest was only in his employ for a month, when he was summarily dismissed. He had now been taken back into Mrs. Robinson's employ, because she wanted his story. The evidence he had given was false.

The witness admitted the adultery with Annie Clifford, at Port Elizabeth.

Mr. Sheil: Do you mean to suggest that your wife has been trumping up this charge?

Defendant: Yes, in order to get rid of me.

Mr. Joubert for the defendant: The mere admission in the plea is not *per se* sufficient proof of the adultery. *Wylde* v. *Wylde* (1 Menz., 269). But even if there is proof of the adultery the plaintiff is not entitled to a decree of divorce, as she connived at her husband's conduct and procured it by means of her agent Daly. *Gower* v. *Gower* (41 L.J., N.S., P. & M., 49.)

According to the English authorities, it is not necessary to establish connivance to prove that the husband (or wife) was accessory before the fact, or that he (or she) took active measures to bring about the result of adultery, but it must appear that he (or she) was cognisant that such a result would follow from transactions of which he or she approved, and to which he (or she) consented. *Glennie* v. *Glennie and Boucles* (8 Jur., N.S., 1,158.) That case is on all fours with the present.

Again, passive connivance is as much a bar as active conspiracy as long as the intention is present that guilt should ensue. *Moorsom* v. *Moorsom* (3 Hagg. 87). See also *Fraser on Husband and Wife* (Vol II., p. 1,186.)

Mr. Sheil, on the question of dissolving the partnership: It should be dissolved on two grounds: (1) because of the benefits conferred by it on the guilty spouse, and (2) owing to the impossibility of the partnership being carried on. The business is practically insolvent, and the interests of both parties will best be served by the appointment of a receiver.

Judgment was given for the plaintiff.

The Acting Chief Justice said: This is an action for divorce on the grounds of adultery. Two charges of adultery are made, one alleged to have been committed at Carnarvon in March, 1893, and the other at Port Elizabeth, in April, 1894. The first charge is denied by the defendant on his pleadings, while the second is admitted, but he says that his conduct was connived at by the plaintiff. In regard to the first charge, which defendant denies, the evidence is not of such a clear character as would induce me to grant the divorce, if that were the only charge brought in this case. However, it is not necessary to say much about it. With regard to the second charge, the admission on the pleadings would not be sufficient without some corroboration to entitle the plaintiff to her decree. The plaintiff, however, has produced the evidence of a detective who saw a person resembling the defendant talking to a woman at Port Elizabeth, and afterwards accompanying her to a house of ill-fame. Defendant was called and he admits that he did exactly as the detective says he saw him do. I think that is sufficient corroboration to satisfy us that the adultery was committed. The question next arises, "Was there any connivance by the plaintiff or not?" The plea of connivance has not been justified in this case. I go with Mr. Joubert to the whole extent of the principle acted upon in the case of *Gower* v. *Gower*. If there had been any procuration or participation in procuration on the part of the plaintiff to induce the other spouse to fall, I should have certainly said that that was a sufficient ground upon which the Court ought to refuse to grant the divorce. In this case, however, there has been no proof of anything of the kind. It is true that this man Day seeing a prostitute in the street, told her to go up the road and she might find someone who would be willing to

consort with her, but he had nothing to do with actually bringing the parties together. Adultery having been committed on that occasion, the plaintiff is entitled to succeed. Plaintiff and defendant have entered into a partnership to carry on a hotel business for two years. By the ante-nuptial contract no benefits were conferred on either side, and there is consequently no necessity for any decree of the Court for a forfeiture, but there is certainly sufficient ground to order the partnership to be dissolved. As both parties have equal rights, it will be necessary to appoint a receiver. A decree of divorce will be granted, the partnership ordered to be dissolved, and Mr. Cornelius appointed liquidator; defendant to pay the costs of the suit, including the expenses of the plaintiff as a witness.

Mr, Justice Barry: Although I do not think Van der Walt and Beest are witnesses of very high character, in one sense I am not prepared to say that in this ca e I totally disbelieve them. But it is not necessary to deal with that question, because I think the second charge is clearly proved by circumstantial evidence corroborated by the defendant's own admission, I certainly do not think that what Daly did in this case can be held to amount to connivance. He was not employed to throw this woman in the man's way, and if the law held what he did to amount to connivance, I should say the law was based on unsound principles. But certainly it is not the law. There has been no connivance by anybody. By his own act this man fell, and he has only to thank himself for the position he is in. As for his wish now to carry on the business in partnership with the woman from whom he is separated for ever, I think the law would be wrong, and we should be wrong, in permitting such an arrangement. Seeing that he has had the management of the hotel and insolvency is now apprehended, it is probable that the result would be to involve the plaintiff in debt. I think it better that the parties should be separated, both in their married life and in their business transactions, that a receiver should be appointed, as suggested by my brother, and that that should be the end of the case.

Mr. Justice Upington concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Reitz & Herold.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

PAULSE AND ROELOF V. THEUNISSEN. } 1894. August 13th.

Costs —New point raised on appeal—Appropriation of payments.

Costs refused where on appeal the amount of a judgment in the Resident Magistrate's Court was reduced by 11s. 7d. *owing to the appellants succeeding on the question of appropriation of payments, that question not having been pleaded or raised in the lower Court; the defence in the Magistrate's Court being one founded on fraud, on which defence appellant failed.*

This was an appeal from a decision of the Assistant Resident Magistrate for Somerset West in an action in which the present appellants, defendants in the Court below, were sued by the respondent as sureties and co-principal debtors for £5 15s. 8d., under a contract entered into between the plaintiff and one Christian Paulse (brother of the first appellant).

The summons alleged: (1) That the plaintiff, on the 29th day of June, 1892, entered into a certain contract or agreement of lease with a certain Christian Paulse, respecting the lease to the said Paulse of a certain building, the property of the plaintiff, at a weekly rental of £1 5s. per week, as also the taking over by Paulse of certain canteen requisites, the property of the plaintiff.

2. That the defendants, on the date aforesaid, and in the presence of subscribed witnesses, signed the contract or agreement of lease as sureties, jointly and severally, for, and on behalf of, Christian Paulse.

3. That Paulse failing to pay the plaintiff the sum of £5 11s. 7d., he, on the 10th May last recovered against Paulse the sum of £5 11s. 7d. by judgment of the Court, together with £1 16s. 1d., his costs.

4. That on the 1st June, 1894, the messenger of the Court, under a warrant of execution, realised the assets of Paulse to the amount of £1 12s., whereby a balance of £5 15s. 8d. is still left due and payable to the plaintiff by the defendants in their capacity as sureties to Paulse.

The plaintiff claimed £5 15s. 8d. with costs of suit.

The defendants in their plea (1) denied all the allegations in the summons, and alleged (2) that the contract, if proved, was void, and (3) that the plaintiff himself failed to carry out the conditions of the contract.

The following was the account rendered by plaintiff to C. Paulse:

Christian Paulse.

Dr. to J. C. Theunissen.

To 8 weeks' house-rent from 3rd Feby. 1893, to 31st March, 1893, at £1 5s. per week	£10	0	0
Balance due on good for	1	10	7
14 dozen empty bottles at 1s. 6d. per dozen	1	1	0
	£12	11	7

Cr. by cash received on account.

April 17th	£0	10	0		
„ 24th	0	10	0		
May 8th	0	10	0		
„ 22nd	0	10	0		
„ 29th	0	10	0		
June 6th	0	10	0		
July 4th	0	10	0		
				£3	10	0
May 1st. Wages due to your son Apollis and placed to your credit	0	10	0		
July 1st. For months May and June '93 ... ... 1894.	1	0	0		
Febry. 1st. Dec. and Jany. 1893	1	0	0		
May 1st. March and April 1893	1	0	0		
				3	10	0
				£7	0	0

Balance sued on £5 11 7

P. Paulse, the first-named defendant, admitted that he signed the contract as surety. but alleged that at the time the contract was signed he told the plaintiff that if he allowed his brother (C. Paulse) to be in arrear with his rent for over three weeks he (P. Paulse) would not be liable, and that the plaintiff agreed to this.

Roelof's defence was that he signed not as surety but as witness.

The Acting Resident Magistrate gave judgment for the amount claimed with costs.

The defendants now appealed.

Mr. Schreiner, Q.C., in support of the appeal: The first appellant (P. Paulse) was released from all obligation by reason of plaintiff's agreement not to allow C. Paulse to remain longer than three weeks in arrear with his rent. *Van Leeuwen's Commentaries* (Vol. 11, p. 49). The present case is distinguishable from *Colonial Government* v. *Edinborough* (4 Juta, 290).

In any case the sureties are entitled to the benefit of payments made by the principal debtor and not specially appropriated at the time. In this case the liability must be reduced to £1 8s. (£10, less £7 and £1 12s.), and cannot at most exceed £3. This point includes the further point that the sureties are not responsible for costs incurred against the principal. The following authorities were cited and discussed: *Voet* (46, 3, 16) *W. P. Bank* v. *Du Toit, Smith and Others* (2 Sheil, p. 23): *Stiglingh* v. *French* (2 Sheil, 293; 9 Juta, 386); *Jefferson* v. *De Morgan* (2 E.D.C., 205); *Hurley* v. *Marais* (2 Juta, 155); *Klopper* v. *Van Straaten* (4 Sheil, 101)

Mr. Justice Upington referred to *Chitty on Contracts* (p. 753), and the cases there cited.

Mr. Searle, Q.C., for the respondent: The doctrine of appropriation does not arise in the present case. It was not pleaded and the plaintiff was not cross-examined on the subject.

In view of *Klopper* v. *Van Straaten* we abandon on the claim for 4s. 1d.

Mr. Schreiner, Q.C., in reply, cited *Grotius* (3, 39, 15) and *Potier on Obligations* (Vol. I., 369—372).

The Acting Chief Justice, in delivering judgment, said: The respondent, Mr. Theunissen, leased to Christian Paulse certain premises in Somerset West by written agreement, to which the two appellants became sureties. By this agreement appellants bound themselves as sureties and co-principal debtors jointly and severally for the due fulfilment of the contract. Paulse did not pay his rent regularly, but got into arrears and made smaller payments than the amount due, and also obtained certain goods from Theunissen. Theunissen made up an account against him as follows: Rent, £10; other things, £2 11s. 7d.; total, £12 11s. 7d., for which amount he sued in the Magistrate's Court, less £3 10s. cash received, and £3 10s. wages due to Paulse's son, leaving a balance claimed of £5 11s. 7d. After obtaining judgment, Theunissen took out an execution against Paulse, but only obtained sufficient to pay a portion of the costs, leaving a balance of 4s. 1d. Adding this amount to the sum of £5 11s. 7d., he sued the sureties for the total, £5 15s. 8d. Mr. Searle has now abandoned the 4s. 1d. claim, as it does not appear that notice was given to the sureties before action, and the amount claimed therefore stands at £5 11s. 7d. In the Court below one of the defences set up was that the contract was void, on the ground as stated in evidence that a fraud had been committed on defendants; and also that the plaintiff had failed to carry out the

conditions. These conditions were that Theunissen had promised Paul Paulse that he would not allow his brother to fall into arrear for more than three weeks' rent. According to Paul Paulse, there was a conversation to this effect, but the agreement is silent on the point. By the written contract the two appellants bound themselves for the whole amount during the entire period. Mr. Theunissen was cross-examined about this in the Court below, but there was no evidence given to prove any subsidary contract, and the Magistrate found very properly against the appellants on that point. He gave judgment for the amount of £5 11s. 7d. and 4s. 1d. On appeal, a new question is raised, which was not heard of in the Court below. Seeing that there was little to be said against the Magistrate's finding, counsel has on appeal relied mainly on the rules of law as to appropriation of payments by which he claimed that the debt should be reduced to only £3. I have great doubts, however, whether this is a case in which the question of appropriation can properly be raised at all. As between the principal debtor and the creditor, there seems from the book which has been put in to have been an appropriation sufficient to leave a balance of £5 due for rent, the amounts set off against the £10 owing being £3 10s. cash and £1 10s. wages due to Paulse's son. But even from this book there does not seem to be any further appropriation of any sum against the amount claimed. The rules for the appropriation of payments are well known. I am quite at one with Mr. Schreiner as to those rules. It is for a debtor at the time he makes a payment to appropriate the payment, and failing him for the creditor to indicate to which object he chooses to appropriate. If these payments are not appropriated, then the law steps in. At the utmost the memorandum book shows that the creditor appropriated the payments of £5 to the sum due for rent; that leaves a balance of £5 due on that account. Theunissen owed a certain amount to a son of Paulse for wages, and had a claim against Paulse for two other amounts. I think Theunissen had a perfect right to appropriate what he owed to the amounts he claimed from Paulse. The only appropriations are £1 10s. wages and £3 10s. cash received, and that leaves a balance of £5. Giving full effect to the law and to this memo. and to the argument raised in this Court for the first time, I think the judgment of the Court below ought to have been for the rent, less any amount appropriated, *i.e.*, for £5 and costs. To that extent the judgment of the Court below will be amended. I may say that what was principally relied upon in the Court below was a charge of fraud against Theunissen, to the effect that he had induced one of the sureties to sign in that capacity when he merely intended to sign as witness to the contract. This charge has utterly failed, and the Magistrate found against the defendants upon this point. Of course the defence relied upon in the Court below does not limit the arguments here, but when new grounds are taken in this Court I think it may affect the question of costs. Under the circumstances, seeing that the judgment of the Court below remains substantially the same, and the trifling alteration made in the amount now awarded arises out of a new defence sprung in this Court, I think this is an instance in which the appellants should pay the costs.

Mr. Justice Barry: I concur. Two points have been raised in this case. First, that the original contract was varied by some evidence as to what took place at the time the contract was signed. Now it appears to me that that evidence was not prominently before the Court below, and was not intended to be relied upon in that Court. It was never even argued, and in my opinion on that point the appellants entirely fail, and they would not as far as that is concerned be entitled to costs; on the contrary, costs would be given against them. But they have raised also the appropriation question, as to which Mr. Schreiner has laid down the law most correctly. The only question of law involved is as to whether the liability for rent was the more onerous one. I am inclined to think that it was. However, it has been shown that there was a special appropriation by the creditors of this £5, and we must therefore, for the reasons stated by my brother Buchanan, allow judgment to be reduced to £5, and no more. Seeing that the appellants have failed with regard to their first contention, and the respondent has had no notice of any sort that this point would be raised, while the reduction has been so much less than Mr. Schreiner contended for, I cannot say that I differ from my brother judges as to the question of costs in this Court, although I am not one of those who think that appeals ought to be discouraged where they clearly come before the Court on a question of law.

Mr. Justice Upington concurred.

[Appellants' Attorney, D. Tennant, jun; Respondent's Attorney, G. Montgomery-Walker.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

TOMES V. TOMES. } 1894. August 14th.

This was an action for restitution of conjugal rights instituted by Charles William Tomes against his wife on the grounds of her malicious desertion.

The declaration alleged that the parties were married in December, 1881, at the West-end Church, Kimberley, that one child was born of the marriage, and that in June, 1883, the defendant maliciously deserted the plaintiff.

The plaintiff claimed:

(*a*) A decree of restitution of conjugal rights, failing which,

(*b*) A decree of divorce.

(*c*) The custody of the child of the marriage.

Mr. Graham appeared for the plaintiff.

The defendant was in default. Process was served on her parents.

Mr. Norman Lacy, of the Colonial Office, produced the marriage register.

Charles William Tomes, plaintiff, deposed: I was married to Louisa Rose Parkes on the 17th December, 1881, at the West-end Church, Kimberley. After our marriage we resided together in Kimberley, fairly happily, for about two years. In 1883 my wife went to Hope Town to join her parents, and there in the month of July the child was born. I have not lived with my wife since. She returned temporarily to Kimberley in September or October, 1884, but stayed at an hotel. I wrote several letters to her after she went away, but received no reply, and I afterwards learned that she had gone away with a man named Tait. I knew him, but that was all, and I have since heard that he died of small-pox in London. My father-in-law told me that the last letter he had from my wife was to the effect that she was going somewhere where she would never be heard of again, and that the child was being educated and well looked after. In case I can ascertain the whereabouts of the child I am prepared to take its custody. I am now living in Johannesburg, where my wife's parents also reside. I see my father-in-law frequently and he is well aware of these proceedings.

The Court made an order for the defendant to return to the plaintiff by the 1st November, failing which a rule *nisi* would issue, to show cause on 15th November why a decree of divorce should not be granted and plaintiff allowed the custody of the child. Publications in the "Gazette" and "Daily Telegraph."

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

ROSS V. DE WET. } 1894. Aug. 16th.

Mr. Tredgold moved for provisional sentence on a promissory note for £174 11s. 9d.

Granted.

VAN NOORDEN V. VEDDENS AND ANOTHER.

Mr. Currey moved for provisional sentence for the sum of £12, balance of a promissory note.

The Court granted provisional sentence, but inflicted a fine of £1, as the note was not stamped.

Ex Parte SEAR.

Mr. Sheil moved for the admission of Mr. Merton Lane Sear as an attorney.

The admission was ordered, the oaths to be taken before the Resident Magistrate at Aliwal North.

REHABILITATION.

On motion from the Bar, the estate of Pieter Johannes Naude was released from sequestration.

GENERAL MOTIONS.

THE PETITION OF WILLIAM J. CRANKO.

Mr. Buchanan moved for the attachment, *ad fundandam jurisdictionem* of this Court, of certain landed property at Observatory-road, registered in the name of John A. Gibson, in an action about to be instituted by petitioner for the removal of obstructions placed on land over which he has a right of way.

Mr. Innes, Q.C., appeared for the respondent, and consented to accept service of the summons at the office of the respondent's attorney, the property not to be parted with pending the

action. The application, he said, was quite unnecessary, though he could not resist it if insisted upon.

The Court made the order asked for. costs of the motion to be costs in the action.

MATHLABANE AND TALA V. SPOGTER. { 1894. Aug. 16th.

Executor dative - Removal.

The Court, on the petition of his sureties, removed an executor dative, who had been convicted of the crime of theft, and who had allowed nearly three years to elapse from the date of his appointment without filing an account.

This was an application on notice to the respondent that he would be required to show cause to-day why he should not be removed from his office of executor dative of the estate of the late Hans Andries, and why a meeting of next of kin and creditors should not be called to elect another executor on the grounds set forth in the petition.

The respondent was appointed executor dative on the 15th October, 1891, the petitioners binding themselves as sureties to the Master for the proper administration by the respondent of the estate.

The respondent, the petitioners alleged, had taken no steps to liquidate the estate, though he had been called upon to do so by the Master, who threatened to take proceedings against the petitioners if the estate was not liquidated at once.

That the only asset in the estate was a lot of ground, being the erf No. 8. situate in the location called Fairbairn. in the division of Stockenstrom, worth about £150, that the respondent was living on this ground, that he refused to sell it. and that he wished to keep it, but had no money to pay for it.

That on the 20th September, 1893, the respondent was convicted of the crime of theft by obtaining goods under false pretences, and sentenced to three months' imprisonment with hard labour.

That amongst the heirs in the estate were several minors, who were being deprived of their inheritance by the action of the executor.

The petitioners prayed for an order (*a*) removing respondent from his office of executor dative; (*b*) authorising the Master to call a meeting of next of kin and creditors to elect an executor in place of the respondent; and (*c*) authorising the payment of the costs out of the estate.

Mr. Sheil was heard in support of the petition.

The respondent was in default.

The Court granted the order as prayed.

[Petitioners' Attorneys, Messrs. Van Zyl & Buissinné.]

KRUGER V. VAN RENEN.

Mr. Tredgold moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against respondent for the recovery of damages for seduction and maintenance of the child, of whom respondent is the father.

The application was granted, and Mr. Tredgold appointed counsel and Mr. De Villiers attorney.

CARL V. CARL.

Mr. Jones on behalf of petitioner, moved for leave to sue *in forma pauperis* in an action against his wife for divorce by reason of her alleged adultery.

Referred to counsel.

BUDD V. YEOMANS AND BUDD. { 1894. August 16th.

Child—Custody.

B., *a resident of Cape Town, sued his wife for divorce on the grounds of her adultery with* F., *and prayed for the custody of the child of the marriage.*

A decree was granted but the custody of the child was given to the defendant's mother, as B. *stated in his evidence that he proposed to send it to Kimberley.*

Subsequent to the divorce proceedings F. *married the defendant, and after the marriage they continued to live at the house of the defendant's mother.*

The Court, on this fact being brought to its notice, and on being satisfied that B. *had made ample provision for the care of his child, and on his undertaking to keep it in Cape Town, where the mother could have access to it, took the custody of the child from the defendant's mother and gave it to* B.

This was an application on notice to the respondents that the Court would be moved to-day for a modification in that part of the order of Court, in the suit of Budd v. Budd and Freeman, entrusting the first-named respondent with the custody of the applicant's child, by removing

the child from her custody to his, and for such order as to costs as to the Court might seem fit.

On the 31st May last the applicant obtained a decree of divorce on the grounds of his wife's adultery with one Freeman.

The custody of the child of the marriage was given to the first-named respondent (Mrs. Budd's mother) until it was seven years old, as the father proposed to send it to Kimberley, the Court being of opinion that the interests of the child would best be consulted by its remaining in Cape Town, where both the parents could have access to it.

On the 16th of July last, Mrs. Budd and Freeman were married before the Resident Magistrate of Simon's Town, and they are now living in the first-named respondent's house in Long-street.

The applicant now claimed the custody of the child, on the grounds that it was being neglected, and allowed to run about the streets without anyone to look after it. The applicant further alleged that he had provided a suitable home for the child in Cape Town, and was prepared to engage a nurse, if necessary.

The respondents, and several other persons, denied the applicant's allegations as to the child being neglected, and alleged that the present proceedings were taken, not in the interests of the child, but with the object of annoying the respondents.

Mr. Graham for the applicant.

Mr. Jones for the respondents.

The Court granted the application.

The Acting Chief Justice, in delivering judgment, said: Plaintiff in this case is the father of the child. He brought an action for divorce against his wife and the co-respondent. He was the innocent party in that action, and he clearly proved adultery between his wife and the co-respondent. He claimed in that action custody of the child. But as he stated in court that his intention was to send the child to Kimberley, where neither party could have access to it, the Court suggested that someone in town should take charge of the child, so that both father and mother could have access to it. The grandmother expressed her willingness to take charge of the child, and the Court granted her the custody, acting as the Court always does in the interests of minors as well as acknowledging the rights of the parties in the suit. The father now comes to the Court and says he has made arrangements to keep the child in Cape Town and have it properly looked after, and prays for its custody. If there were nothing else in the case I should say that, following the ordinary rule, the father was entitled to the custody of the child. But there are other circumstances which have been referred to. Mrs. Yeomans, to whom the custody of the child was given, has been living in the same house as her daughter and the person with whom the adultery was committed, and to allow the child to be brought up with these parties in the same house would be a most improper proceeding. However, in law, the father is, as I have said, entitled to the custody of the child. The application will be granted, the mother to have access to the child at all reasonable times. No order as to costs.

Sir Jacob Barry: I think, after all we have heard, it would be an insult to the plaintiff to force him to go to that house to see his child, and on that ground Mrs. Yeomans has proved herself unfit to have the custody of the child.

Mr. Justice Upington concurred.

[Applicant's Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorney, D. Tennant, jun.]

Re CAPE OF GOOD HOPE BANK.

Mr. Molteno moved for authority to the unofficial liquidators to file and rank a claim lodged with them by the depositor of the Ebden Memorial Window Fund, which by inadvertence was omitted to be proved within the period fixed by the Court for such purpose.

The application was granted.

MAKALELA V. MAKALELA.

On the motion of Mr. Tredgold, the trial of the suit was ordered to be removed to the next Circuit Court, Prince Albert.

Notice of the day of trial to be given to the defendant.

SMIT V. SMIT. { 1894. August 16th.

This was an action for restitution of conjugal rights, instituted by Floris Jacobus Smit against his wife, Johanna Jacoba Smit (born Kennedy), on the grounds of her malicious desertion.

The declaration alleged that the parties were married in community on 8th February, 1886, at Moorreesburg, in the district of Malmesbury, that there was one child, a daughter, issue of the marriage, and that the desertion took place in November, 1887.

The plaintiff claimed:

(*a*) That defendant be ordered to restore to him his conjugal rights, and failing compliance with such order,

(*b*) A decree of divorce.

(*c*) Custody of the child.

(*d*) Division of the joint estate, and forfeiture of benefits by the defendant.

(*e*) Costs of suit.

The defendant in her plea admitted that she had refused to restore to the plaintiff his conjugal rights by reason of the fact that he deserted her in November, 1887, and neglected to make provision for herself and child of the marriage. She also alleged that the plaintiff was not in a position to support her and the child in case she consented to return to him, and she prayed that his claim might be dismissed with costs, or in the alternative that she might be allowed to retain the custody of the child.

Issue was joined on these proceedings.

Mr. Buchanan appeared for the plaintiff, and Mr. Webber for the defendant.

The plaintiff having given evidence as to his wife's refusal to go and live with him on his farm in the district of Kenhardt, the defendant was called by the Court and expressed her willingness to return to her husband on his guaranteeing that he would properly provide for her.

A decree of restitution was granted, the defendant to return to her husband on or before 15th October next, failing which, to show cause on 1st November why a decree of divorce should not be granted.

No order as to costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

REGINA V. DU PREEZ AND BADENHORST. | 1894. August 20th. „ 28th.

Criminal prosecution—Close of case—Evidence—Admissibility—Review.

Du P. *and* B., *two Europeans, were, together with three coloured men, charged with the crime of malicious injury to property before the Resident Magistrate of Worcester.*

An agent conducted the prosecution, and up to the time the case for the Crown and the defence had closed, no evidence whatever was adduced against Du P. *and* B.

The three coloured men were found guilty and sentenced, and, after an adjournment of the Court, were called to give evidence against Du P. *and* B.

The attorney for Du P. *and* B. *objected to the evidence as the case for the Crown and for the defence had closed.*

The Magistrate overruled the objection, received the evidence, and convicted Du P. *and* B

Held on review, *by a majority of the Court,* (Barry J.P., E.D.C., *dissenting*) *that the evidence was inadmissible, and that* Du P. *and* B. *had been wrongly convicted.*

Mr. Justice Upington drew the attention of the Attorney-General to the case of the Queen v. Du Preez, Badenhorst, and others, heard before the Resident Magistrate of Worcester. He said: Exception seems to have been taken to the reception of certain evidence on the ground that the case for the prosecution and for the defence had closed. The record shows that this exception was taken on behalf of Du Preez and Badenhorst, two white men, who were charged, with three coloured men, with malicious injury to property by overturning a loaded wagon, and it was overruled. The three coloured men pleaded guilty; the white men pleaded not guilty. Up to the time the prosecution was alleged to have closed there was no evidence whatever against the white men. The three coloured men were sentenced, and after an adjournment of the Court they were put into the witness-box, when they gave evidence incriminating the two white men, with the result that the latter were also convicted. This case has been brought specially to my notice by a letter from the attorney who defended the prisoners. It is a somewhat unusual course to take, but he says they have no means at their disposal to prosecute an appeal. As the point raised is of some importance, I would call the Attorney-General's attention to it.

Afterwards on the 28th August Mr. Giddy argued in support of the conviction. He contended that when the coloured men were called as witnesses the case for the Crown had not closed, that the agent who appeared for the prosecution had no power to prosecute as the Magistrate was the prosecutor, and it was in his power only to close the case.

Again, the prisoners were not prejudiced. He cited *R.* v. *Frost* (9 C. & P., 129). He referred to Ordinance 40 of 1828, section 5, and Ordinance 73 of 1830, section 3, and urged that even if there had been a slight irregularity in the proceedings it was not so gross as to justify the conviction being quashed.

Sir Jacob D. Barry: A juror trying a case may be called as a witness. I myself have done so.

Mr. Justice Upington referred to *Junker* v. *The Queen* (3 Juta, 46).

Mr. Giddy referred to *Queen* v. *Bradford* (7 Juta 169).

The conviction was quashed by a majority of the Court.

The Acting Chief Justice delivered judgment as follows: In this case five prisoners—two white and three coloured—were tried before the Resident Magistrate on a charge of malicious injury to property. An agent appeared on behalf of the prosecution and conducted the case, and an attorney appeared on behalf of two of the accused. Three of the prisoners pleaded guilty; two not guilty. The prosecutor called his witnesses and closed his case. Afterwards the attorney for the defendants was called upon, and he closed his case. Up to that time there was no evidence at all upon which to convict the two white prisoners. The Magistrate adjourned the Court, and after an interval during which the three prisoners had been in the custody of and in communication with the goaler and the police, he called up the three prisoners who had pleaded guilty, sentenced them, and then allowed the prosecutor to call them as witnesses on behalf of the prosecution. Seeing that both the prosecutor and the defendants had closed their cases, this was certainly an irregularity. No doubt the Court has certain powers to allow evidence to be given after the closing of the case, and it might allow the defendant to re-open the case for the purpose of explaining away any facts which had not been brought forward, but I must say that in my experience I have never known a case in which the prosecutor has been allowed to call further evidence to convict a prisoner after the defendant has closed his case, and when up to that time there was no evidence at all on the record to justify a conviction. The only question which now remains is whether this is such an irregularity as would justify us in quashing the conviction. The attorney in the Court below objected to the coloured prisoners being called as witnesses on the ground that they were accomplices, but I think they were competent witnesses after being sentenced, and might have then been examined at the proper time. The irregularity which I complain of, and on which I think this conviction must be quashed, is that it was not competent for the prosecutor to bring forward fresh evidence after the case on both sides had been closed. It is contended that the accused might be allowed to rebut the fresh evidence, but it would be certainly introducing an entirely new principle to allow the prosecutor, after the case on both sides was closed, to call entirely new evidence, set up a fresh case, and then allow the prisoner to call rebutting evidence. If such a course were allowed a trial might go on interminably. On these grounds, I have come to the conclusion that this is such an irregularity as ought not to be sanctioned, and that we must quash the conviction of the two prisoners, against whom there was no evidence when the case on both sides was closed.

Mr. Justice Barry in dissenting said: In my view of this case I think the Court ought not to interfere with the conviction. There was evidence in the case which is legal evidence against the prisoners, namely, there was evidence of the crime being committed with which they were connected by the incriminating evidence now objected to, viz., that of these other prisoners with whom they were tried. In my opinion the Court had the power to allow this evidence to be produced at any stage before conviction. In allowing the prosecutor to adduce such evidence in the present instance, the Court only exercised its discretionary power. It is said that the Court could not allow the Crown to do so after the prisoners had called their evidence, and closed their case. I confess I cannot see on what principle this is to be held as absolute law. If it be absolute law, the effect would be to exclude evidence which might be considered even by the prisoners themselves to be favourable to their case. The result would be that after the evidence for the Crown, and after the prisoner's evidence had been closed, if no power is allowed to the Court to admit further evidence, a man might be wrongfully convicted, which would be a gross injustice. But when it is said that this power may exist in favour of the prisoner, but not in favour of the Crown, I confess I see no difference in principle. No doubt there are certain modes of procedure, and the Court will take care that those modes of procedure are followed. But there may be in the discretion of the Court an irregularity, or rather a departure from the usual mode of procedure, without vitiating the proceedings, and in support of that view we have the Act 5 of 1879, which created a criminal Court of Appeal with power to deal with irregularities of procedure. In that Act there is this express proviso to section 27: "Provided that no conviction shall be set aside by reason only of some irregularity or illegality whereby the defendant was not prejudiced in his defence, or because evidence was improperly admitted or rejected, by which no substantial wrong was, in the opin-

tion of the Court of Appeal, done to the defendant." I cannot discover here where any substantial wrong was done to the accused, unless it be shown that after the admission of this evidence they requested that further evidence should be allowed to be called on their behalf, or that their own evidence should be allowed to be given and that that was refused. Nothing of the kind is on record, so that I cannot discover that there has been any substantial wrong done to them by reason of that irregularity. For these reasons I have come to the conclusion that I should not intefere with the conviction.

Mr. Justice Upington in concurring with the Acting Chief Justice said: I have never had any doubt with regard to this case; in fact, I should have quashed the conviction immediately had I not thought it advisable that the Attorney-General should have had an opportunity of saying a word with regard to it. The case of the Crown, in my opinion, was simply unarguable.

REGINA V. TAYLOR. { 1894. Aug. 20th.

Mr. Justice Upington said: There is another case which came before me on review from the decision of the Resident Magistrate at Oudtshoorn, the case of the Queen v. Emily Taylor, who was convicted of the crime of theft. The sentence is a very peculiar one—nine months' imprisonment with hard labour, and the accused to be removed to a reformatory when arrangements can be made, or to such other place as the Governor may direct. I think the Magistrate rather exceeded his jurisdiction in going beyond the sentence of imprisonment, for unless my memory deceives me, sixteen is the limit of age for reformatories, and this woman was seventeen. Even if that were not so, the sentence is too indefinite, and all the words after imprisonment with hard labour should be struck out.

COLLECTOR OF CUSTOMS V. SPENCE AND DRURY. { 1894. Aug. 20th. „ 27th.

Merchandise Marks Act—False trade description — Cigar boxes — Labels — Forfeiture.

S. and D., *carrying on business at East London, imported on behalf of a Johannesburg firm the constituent parts of cigar boxes, consisting of pieces of wood from which the boxes were to be made, and also labels to be pasted or gummed upon the boxes, both wood and labels being manufactured in Germany.*

The pieces of wood were branded Perla de Cuba *and* Habana *and on some of the labels appeared the Spanish words* Fabrica de Tobaccos.

The boxes when put together were intended to contain cigars made in the Transvaal from Havana tobacco.

Held, *in an action for a forfeiture under the Merchandise Marks Act, that the goods in question contained a false trade description and were liable to forfeiture.*

This was an action instituted by the Colonial Government against the defendants, who carry on business as importers at East London, for forfeiture of certain goods and for a penalty of £100.

The declaration alleged that on 12th April, 1894, the defendants wrongfully and unlawfully, and in contravention of the provisions of Acts Nos. 10 of 1872 and 12 of 1888, imported into this colony from England at the port of East London certain goods for the purpose of trade or manufacture, consisting of the constituent parts of tobacco boxes for the purpose of containing cigars, and labels intended to be used for the purpose of being pasted or gummed upon such boxes, which said goods so imported were contained in two cases marked respectively "E.J.S., 1615" and "E.J.S., 1618."

The said constituent parts are branded, *inter alia*, with the words "Perla de Cuba" and "Habana," and the labels contain words "Fabrica de Tobaccos" in the Spanish language.

The said constituent parts and labels constitute a forged trade-mark, a false trade description, and are calculated to lead to the belief that the goods in connection with which they are used are designated or described by that trade-mark or trade description, and the said constituent parts of the tobacco boxes and the said labels constitute things to which a forged trade-mark or false trade description is applied for the purposes of trade or manufacture.

The said constituent parts of the tobacco boxes and the labels so imported as aforesaid, were contained in two cases marked "E.J.S., 1615," and "E.J.S., 1618." and were seized by the plaintiff as he was lawfully entitled to do under the provisions of the Acts aforesaid. By such wrongful and unlawful importation as aforesaid, the defendants have rendered themselves liable under the provisions of the Acts aforesaid: (1) to the forfeiture of the said constituent parts of tobacco boxes and labels contained in the cases so marked as aforesaid; and (2) to a penalty of £100.

The plaintiff prayed for:

(*a*) The forfeiture.

(*b*) The penalty of £100 and costs of suit.

The defendants specially pleaded that the said constituent parts and labels were not imported wrongfully and unlawfully, or in contravention of the Acts. No. 10 of 1872 and 12 of 1888, but *bona fide* and in the proper and ordinary course of business for the declared purpose of being forwarded to the S.A. Republic to the consignee, one Isidore Schaap, of Johannesburg, and that the seizure thereof was wrongful and unlawful, and had caused damage to the defendants in the sum of £100. Wherefore they prayed that the plaintiff's claim might be dismissed, with costs, and they claimed in reconvention £100 as damages for the alleged wrongful seizure and delivery of the goods seized.

The replication denied the allegations in the plea, and issue was joined on these pleadings.

The Attorney-General and Mr. Giddy for the Government,

Mr. Schreiner, Q.C., and Mr. Currey for the defendants.

Mr. J. D. Overbeek, Assistant Collector of Customs, said: The goods in question were shipped at Southampton for East London by the Arab. I have had thirty years' experience in Her Majesty's Customs, and am able to state that as a general rule cigars are imported in boxes of various sizes, containing from 25 to 200. I know a firm called Valle & Co. at Havana, and I produce a price list, dated 1888, issued by that firm in which mention is made of a brand called *Perla de Cuba*.

No regulations had been made under section 20 of the Act 12 of 1888. Cigars, with the exception of some from the East, were usually imported in boxes.

The witness was then asked if he knew that *Perla de Cuba* was a registered trade-mark of Valle & Co., of Cuba. The question was objected to and disallowed.

He did not remember having seen a box of *Perla de Cubas* in this country.

Cross-examined: Large quantities of Havana tobacco are imported in the leaf, and cigars are made of it all over the world. Every connoisseur understands by the term "genuine Havana" a cigar *bona fide* made in Cuba, and not one made in Hamburg or elsewhere. All cigars purporting to be Havana cigars, but imported from other places are seized by the Customs, unless they bear the qualifying label, "made in such or such a place." We have such a case now pending in Cape Town. These boxes were under rebate for the Transvaal, and could not be consumed in this colony unless re-imported. We did not seize all the boxes, but only so much of them as were impressed with marks rendering them liable to seizure. The labels in question contain words in a language which is not necessary to describe articles either in the country where the goods were made or in the country where they are to be sold. We seized the boxes because they were to be used for the purpose of containing cigars which are not Spanish. The Act distinctly lays down that the Customs-house authorities shall decide what is, or what is not a misleading trade-mark, and the Court is to decide afterwards whether they are right or wrong. I should have passed these labels if the languages used had been English or Dutch.

But speaking broadly, is not the Spanish language used all over the world in the tobacco trade without any intention to mislead?—Possibly.

Do you mean to say that the Spanish language is an indication direct or indirect to the purchaser that the goods covered by the language were made in Spain?—No, but in a Spanish-speaking country.

And you stop resolutely any article coming from a country in respect of which a description is applied in a language which is not habitually spoken in that country?—Yes, or the country where they are going to be sold.

I suppose, then, at every port of entry you have linguistic experts connected with the Customs Department?—Most of us are more or less educated, and know something about foreign languages. For instance, we know the difference between French and German, or between Dutch and Portuguese, and we can generally make out what a label means.

If you saw that piece of wood (pointing to the stamped cover of a box) would you say that it was manufactured in Cuba?—I would not say so, but others might think so.

Mr. Justice Upington: If a box like that were shown to me as containing cigars I should think so too. How could I tell that they were not made in Cuba.

In further cross-examination witness said: I know that a large quantity of the Havana tobacco is exported to be made up into cigars elsewhere. If a box bearing a Havana label were filled with Manillas, I should seize it as fraudulent. In the Transvaal, there is a duty of 15s. per 100 on cigars, but only 2s. 6d. per pound on tobacco. I do not think any attempt is made in the Transvaal to protect the purchaser. Anyone who made a sworn declaration would be able to get labels, which could be pasted on boxes of locally-made cigars, and which could be sold as coming from Cuba.

Walter Misdorp, cigar importer, of Cape Town, deposed: Havana cigars are always imported in boxes. The labels produced would give me the idea that the cigars contained in boxes so labelled were made in Havana, and boxed there.

This closed the case for the Crown.

Mr. Isidore L. Schaap, of Johannesburg, for whom the goods in dispute were imported, was called. He said: Similar boxes have been previously imported through the port, and passed without question. I do not manufacture cigars myself. We have five or six cigar-makers in Johannesburg, and I supply them with the tobacco, boxes, and labels. I import the whole of my tobacco from Amsterdam. Some of it is of the Havana variety. I am the agent of the firm in Saxony who have the right to manufacture these labels. A high duty is placed by the Transvaal Government on cigars for protection purposes, and to encourage local manufactures. The Spanish language is principally used in the cigar trade. No cigar can leave a factory in the Transvaal without bearing the stamp of the Government as well as that of the factory. All imported cigars are detained in bond until the 15s. band has been placed upon them, and those bands are not sold save on production of the invoice. There is no duty on home-made cigars, and the labels are put on in the factories.

Cross-examined: Cigars made of Transvaal tobacco are not as a rule sold in boxes, but they sometimes find their way into boxes bearing labels in the Spanish language. There is no fraud in that, because Spanish is the language of the trade. Mr. Misdorp's evidence shows that that witness knows nothing about the trade. The labels on these boxes means that the cigars are made of Havana tobacco, and that is all.

Cur. ad vult.

Postea (27th August),

The Acting Chief Justice, in delivering judgment, said: In this case the Collector of Customs prays the forfeiture of certain goods, which are described as the "constituent parts" and labels of cigar boxes imported by the defendants into this colony from England in April last. The declaration sets forth that the said constituent parts are branded, *inter alia*, with the words "Perla de Cuba" and "Habana," and that the labels contain the words "Fabrica de Tobaccos" in the Spanish language; that the said constituent parts and labels constitute a forged trade mark, or false trade description, and are calculated to lead to the belief that the goods in connection with which they are used are designated or described by that trade mark or trade description; and that the said constituent parts of the cigarboxes and labels constitute things to which a forged trade mark or false trade description is applied for the purposes of trade. The Collector of Customs also claims a penalty of £100. These claims are laid as being made under the provisions of Acts No. 10, 1872, and No. 12 of 1888, but no sections of these Acts are specifically referred to in the declaration. The defendants, in their plea, say that the said constituent parts and labels were not imported wrongfully, unlawfully, or in contravention of the said Acts, but *bona fide*, and in the ordinary course of business, for the declared purpose of being forwarded to the South African Republic to the consignee; and that the seizure thereof by the Customs was wrongful and unlawful. They claim in reconvention £100 damages for the said seizure. No exception was taken to this plea, but issued was joined thereon. It is admitted by the plaintiff that the goods were intended for the Transvaal, and Mr. Overbeek in his evidence states that these goods could not be consumed in this colony, unless re-imported. In my opinion, however, this would not exempt the goods from seizure, if the goods come under the description of things prohibited by our statutes from being imported into this colony. The 20th section of Act No. 12, 1888, empowers the Governor, at the request of the Government of any State beyond our boundaries, to exempt from the operation of the Act goods intended only for transit through the Colony: but no regulations have as yet been framed for this purpose. The plea, therefore, in so far as this allegation is concerned, discloses no defence, as was admitted by defendants' counsel. It is clear that these goods do not come within the provisions of the Customs Management Act No. 10, 1872. The 14th section of that Act only prohibits the importation of "articles of foreign manufacture, and packages of such articles bearing any names, brands, or marks purporting to be the names, brands, or marks of manufacturers resident in the United Kingdom or any British possession." Consequently Act No. 12, 1888, was mainly relied upon in argument. The object of this Act is to make provision against fraudulent marks on merchandise. The first part of the Act deals with offences committed in the Colony, and provides punishments and defines terms, and has no reference at all to the Customs. It is only when we come to the 13th clause that there is any such reference. That section declares that it is expedient to make further provision for prohibiting the importation of goods which, if sold, would be liable to forfeiture under the Act No. 12, 1888. It places in the same category as those included in the 14th section of the Customs Act of 1872 "all

such goods, and also all goods of foreign manufacture bearing any name or trade mark being or purporting to be the name or trade mark of any manufacturer, dealer, or trader in the Colony, unless such name or trade mark is accompanied by a definite indication of the country in which the goods were made or produced." Now as there is no evidence that the trade mark of any Colonial dealer has been affected, these goods can only come under this section if they are included by the words "all such goods." Looking at the context, in my opinion the proper construction to be put on these words is, such goods as by the preceding sections of the Act would be liable to forfeiture if sold in the Colony. Referring back then to the first portion of the Act, we find that section 1, sub-section 2, provides that "every person who sells, or exposes for sale, or has in his possession for sale, or any purpose of trade or manufacture, any goods or things to which any forged trade mark or false trade description is applied, or to which any trade mark or mark so nearly resembling a trade mark as to be calculated to deceive is falsely applied," shall, unless he proves that he acted innocently, be guilty of an offence: and by the third sub-section, in case of conviction, the accused is liable, in addition to other penalties, to have forfeited, at the discretion of the Court, "the chattel, article, instrument, or thing by means of or in relation to which the offence has been committed." As there is no evidence that any trade mark has been forged, the next consideration is as to what constitutes a false trade description. In the second section the expression "trade description" is defined as meaning any description, statement, or other indication, direct or indirect, as, *inter alia*, to the place or country in which any goods were made or produced. The peculiarity of this case lies in the nature of the things seized. It is argued that no one would suppose that the mere pieces of wood were manufactured in Cuba, for it is stated that that kind of wood does not grow in that island; nor that the labels came from there, as they bear a mark showing that they were printed in Germany. But, in reply, it is urged that as the evidence shows it is intended when these pieces of wood are put together, and the labels are affixed to them, to fill these boxes with cigars manufactured in South Africa, that the public, relying on the description of the boxes, would then be deceived into buying the cigars supposing them to be of veritable Cuban production. Mr. Misdorp states clearly that in the trade cigars in boxes bearing these marks would be considered as being cigars made in Havana, of Havana tobacco, and packed in boxes in Havana. Now, on this evidence, if these "constituent parts" of the boxes were put together and filled with cigars not made in Cuba, and were offered for sale in this colony, there could, in my opinion, be no doubt that a false trade description had been applied to the cigars so offered for sale, and that they would be liable to forfeiture under our Act. The evidence of the consignee, Mr. Schaap, that in the Transvaal it would not be considered a false representation if the boxes were filled with cigars locally made, if made from tobacco imported from Havana, is beside the question, and only shows, if his statement is correct, that in the Transvaal different considerations prevail. The issue in this case, as it appears to me, depends on the question whether or not the constituent parts of these boxes by themselves, when not sold with or actually holding any cigars, could be forfeited if sold in this colony. For the plaintiff the 4th section of the Act has been cited, which provides that a person shall be deemed to apply a trade description to goods who applies it to any covering (including a box), label, or other thing in or with which the goods are sold or exposed or had in possession, but the fair construction of this section is, I think, that the goods are to be taken with the covering, &c. I have, however, come to the conclusion on the evidence that the value of these "constituent parts" does not consist solely in the fact that they can be made up into cigar boxes, but that they have an appreciable value in consequence of the trade description placed upon them. Further, that this trade description is in itself false, as it represents that the boxes were made or produced in Cuba, and would be so regarded by the public. No doubt in ordinary circumstances we ought not to presume that there is an intention to commit a fraud, but in this case we have it that the very object of the importation is to use these boxes for the sale of cigars not made in Cuba. According to English cases, if in fact an incorrect and misleading trade description is knowingly used, the defendant is liable. Vide *Starey* v. *The Chillingworth Gunpowder Company*, 24 Q.B. Div., 90; *Wood* v. *Burgess*, 24 Q.B. Div., 162. In the latter case, in construing sub-section 2 of section 2 of the English Statute, 50 and 51 Vic., c. 28, which is identical with the corresponding section of our Act, the Court held that an intent to defraud is not a necessary ingredient of the offence of contravening the section. There is no attempt in this case to qualify the use of the erroneous description on the boxes with any statement such as is provided for by the 15th section of the Act. Under these circumstances, I am of opinion that as a false trade

description has been applied to these goods they would be liable to forfeiture if sold in the Colony. That being so, it follows that the importation of these goods is prohibited by section 13 of Act No. 12, 1888. The Customs authorities are therefore entitled to succeed on the first prayer of the declaration. The claim for the penalty is not insisted upon. Judgment will be for the plaintiff, with costs, and the goods in question declared to be forfeited. Since preparing this judgment my brother Upington has called my attention to *Sebastian's Digest of Cases*, section 542, which cites *Kinney* v. *Barch*, decided in the N.Y. Supreme Court, that "the use of any words, geographical or otherwise, numerals, or symbols, adopted for the purpose of defrauding the public, will be restrained by the Court. It is the duty of the Court to protect the public from fraud, even at the suit of a plaintiff who has not the exclusive right to the use of such words, numerals, or symbols."

Mr. Justice Barry: I have read and concur in the judgment. These parts of cigar boxes were undoubtedly goods within the meaning of the Act. On the lids there was a description which is a trade description, and the description means that these lids and boxes came from Cuba. The evidence shows this to be false, and accordingly for these reasons I come to the conclusion that there has been a violation of the law and that the goods are liable to forfeiture.

Mr. Schreiner: Will your lordship allow me to ask whether the judgment of the Court will extend also to the labels which did not contain the words Cuba or Habana, and were imported separately?

The Acting Chief Justice: If these labels had been imported separately there might have been some ground for excluding them from the judgment, but according to the Customs bill of entry they are constituent parts of the boxes. Under the circumstances, as they are all imported in one case, they must stand or fall together.

Mr. Justice Barry: Although it has been argued that these goods could be sold in the Transvaal, I very much doubt whether that be so. I am very strongly inclined to think that if a box of cigars manufactured in the Transvaal, for instance, were to be labelled with these labels and were so purchased by somebody who considered that he had been defrauded, the Court there would probably come to the conclusion that fraud had been practised.

Mr. Justice Upington concurred.

[Attorneys for the Government, Messrs. J. & H. Reid & Nephew; Attorneys for the defendants, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

LYONS V. THE COMMITTEE OF MANAGEMENT OF THE JEWISH PUBLIC SCHOOL. | 1894. Aug. 21st.

Contract—Breach—Damages.

This was an action for £100, damages for breach of contract.

The declaration alleged that in the month of February last the defendants engaged the plaintiff as Hebrew teacher at a salary of £150 per annum, and agreed to pay him the sum of £10 for the expenses of his journey from Johannesburg to Cape Town.

That in terms of his agreement the plaintiff journeyed to Cape Town, and presented himself to the defendants.

That the defendants refused to pay the plaintiff the aforesaid salary of £150 per annum, and the said sum of £10, but offered in lieu thereof £120 per annum, and the sum of £7, which terms were accepted by the plaintiff.

That thereafter the defendants, in breach of the contract, refused to pay the sum of £7, and to accept the services of plaintiff as Hebrew teacher.

The plaintiff claimed:

(*a*) £100 damages.

(*b*) £7, expenses agreed upon.

(*c*) Alternative relief with costs.

The defendants in their plea admitted the offer of £120 per annum, and £7 expenses, but said that it was a condition of the said offer that the plaintiff should enter into and sign a written agreement, copy of which was annexed to the plea.

That the plaintiff agreed to the conditions of the agreement, and promised to sign the same, but subsequently he refused to do so, and the defendants refused to pay him any sum of money, or to enter into any other agreement with him.

They denied that the plaintiff had sustained damages in the sum of £100, or any portion thereof, and they said that the plaintiff never tendered his services as teacher in the said school, or tendered to perform any duties as teacher therein.

They denied that the plaintiff was entitled to sue in this action by reason of the premises, and they said that in all their dealings with the plaintiff they acted in their capacity of members of the committee of the said school, and not in their individual capacity, and that they could not be liable to the plaintiff in any manner in their individual capacity. Wherefore they prayed that the plaintiff's claim might be dismissed.

Issue was joined on these pleadings.

Mr. Molteno appeared for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Duxbury for the defendants.

Plaintiff, on being sworn, said: I have been a schoolmaster for about fourteen years. Between 1889 and 1891 I acted as first assistant master in the Jewish Collegiate School at Cape Town, and resigned that appointment on returning to England. I returned to the Colony in March, 1892, and at once reported myself to the Education Department, with the result that shortly afterwards, on Dr. Muir's recommendation, I was appointed assistant master at the Public School for Boys at Oudtshoorn at a salary of £150 per annun, supplemented by an allowance of £50 from the Jewish community for giving instruction in Hebrew. I tendered my resignation at Oudtshoorn after fifteen months' service on account of the school being in financial difficulties. The managers thought it wise to reduce the salaries of the assistant masters, and as I did not care about that I decided to leave. I then went to Johannesburg. After doing nothing for a week or two, I started in January a private school with twelve or thirteen pupils, and I had several private pupils as well in English and Hebrew. On the 16th January I received a telegram from Cape Town to the following effect: "Jewish schools open 22nd instant. Will you accept Hebrew teachership? Reply, stating salary, President." To that I replied on the same date: "Will accept post. Salary, £250 a year; expenses," but received no reply. On the 19th I wired to Mr. Fletcher: "Make offer," and received the answer: "Salary £100 a year beginning; accepted, come once." I then wired back, saying: "Wire money Standard Bank; leaving." However, on thinking the matter over I changed my mind, and wrote the following letter: "I beg to inform you that I cannot accept the post you offer under £200 per annum. If you are prepared to give that sum, and forward sufficient money for my travelling expenses, I shall be pleased to come at once. As I am opening a school here shortly, an immediate reply will oblige." I did not cancel my telegram, as I was short of money, and had to borrow in order to pay for the wire. Next day I received a wire from Mr. Fletcher, as follows: "Letter of instructions leaves to-day. Get ready Tuesday. First-class ticket follows." This was followed by a letter, enclosing certificate and requesting me not to delay a moment, as the school opens on the 22nd January. On the 23rd I wired: "Received certificate. Leave to-night if you give £150 and wire £10 Standard Bank. Reply." In reply to my first telegram accepting the offer of £100 a year, Mr. Fletcher answered: "Come at once. Will give you £10 here." I never received the following letter: "If you wish to come, you are welcome; if not, send Government tickets back next post, and if anyone else should come to town with these tickets he will get into trouble. We would send you your travelling expenses, but regret that you are not a man of your word. . . . Our school is going on first class, and is not going to be destroyed by you. All the influential members in Cape Town, Jews and Christians, are helping us." On the 27th there was a further telegram from Fletcher as follows: "If you don't wish to come, return certificate. We send no money." I replied: "Wish to come. Can't get the money." I tried to collect money enough, but failed, and matters drifted on until the 16th February, when Mr. Pelham, of Johannesburg, wired on my behalf: "Is berth open for Lyons? Reply." The reply was: "Berth open; come immediately," I borrowed £5 from Mr. Pelham, and sold some goods, and started for Cape Town. I was met by Fletcher and Goldberg at the station, and taken to the latter's boarding-house in Strand-street. About nine o'clock that morning there was a meeting of the committee, Fletcher, Levy, Goldberg, and Lazarus being present. Levy acted for the most part as spokesman, and said that the most they could afford was £120 per annum. I said I considered this was a very poor salary, but ultimately agreed to accept it, with £7 travelling expenses. Nothing was said at this time about signing any contract, but on the following day, when I again met the committee in the afternoon at the boarding-house, an agreement was produced, which it was said it would be necessary for me to sign. The agreement was that the appointment should be for twelve months certain, and after that date to be terminable on three months' notice being given on either side. At the same time the committee reserved to themselves the right to give three months' notice at any time in case of misbehaviour, or if I beat the children. I asked for a little time in which to read the contract through, and after making a copy of it said I thought it was a stupidly-worded document, but said I would sign it on condition that a clause was inserted to cover payment of the travelling expenses. Levy said: "We will pay you the expenses on Monday, and you can take our word for that." I replied: "I will sign the contract on payment of my expenses, and you can take my word for that." The committee thereupon waxed warm, and either Levy or Fletcher (I don't know which) tore up the contract and left, refusing to

have anything more to do with me. On the following Monday morning, acting under legal advice, I presented myself at the school, and was informed by Mr. Lazarus that my services were not required. On calling upon Mr. Fletcher subsequently, the latter said: "We have done with you. We have engaged someone else." In that case, I said I might have to bring an action. Fletcher said he was not afraid. In his youth he had appeared before the Emperor of Austria, and would not be afraid of the judges, Governor, or anyhody else. On the 26th February plaintiff's solicitors wrote threatening the action.

Cross-examined: My school in Johannesburg was started and in working order before these offers were made. The date of the opening was the 15th, but I may have written on the 19th saying that the school was about to be opened. I had thirteen pupils at 15s. per month in addition to private pupils. I had no formal contract at Oudtshoorn, nor have I made more than a verbal arrangement at any time. I am quite sure that my first meeting with the committee took place on the day of my arrival, and that a verbal contract was then arrived at. If my travelling expenses had been paid I should have signed the contract, though I was not altogether pleased with it. Mr. Levy did not offer to give his personal guarantee that the travelling expenses would be paid. They knew my poverty, and wished to push me into a corner. I did nothing for some time, but in April or March I joined Miss Bevan's theatrical company. At the present time I am living with a friend and receiving my board and residence in exchange for services. I did not at the end of March or beginning of April visit Mr. Fletcher at his house to ascertain whether the situation was still open. I did not say I was sorry for what had occurred. My interview with Fletcher at his house was in February.

Re-examined: I have made every effort to get work, and am now keeping books in return for my board and lodging. I played as an amateur with Miss Bevan's company at Oudtshoorn, and was engaged by her to play a small part here for three weeks. I received £7 10s. in all. When I landed in Cape Town I had only four shillings in my pocket.

Percival John Pickering, advertising manager to Messrs. F. H. Clarke & Co., said: In February last I was residing at Mr. Goldberg's boarding-house in Strand-street, where I met the plaintiff. I remember his meeting the Jewish Committee on the day after his arrival. The interview took place in the drawing-room. I and several others left the room, thinking they wished to talk business, and we went out on to the stoep. While there I overheard some of the conversation, which was conducted in a very loud tone of voice. I heard Lyons say he would sign the contract if his travelling expenses were paid. The parties swore at each other a good deal, and finally went out.

Cross-examined: Some of his statements made in the affidavit were a mistake.

Arthur Gerald Bell said: In February last I was staying at Mr. Goldberg's boarding-house. I was present on the occasion of the visit of the Jewish Committee, and overheard portions of the conversation. I am able to confirm the statements of the last witness. Lyons said that he would sign some agreement provided his travelling expenses were paid.

Cross-examined: This conversation took place between three or four o'clock in the afternoon. He called that after lunch. It lasted two hours.

This closed the case for the plaintiff.

Mr. Innes asked for absolution from the instance, but after argument the Court determined to hear the witnesses for the defence.

Abraham Levy, vice-president and treasurer of the Jewish school, said: On the day after Mr. Lyons's arrival, Messrs. Goldberg, Lazarus, Levy, and myself met him at the boarding-house in Strand-street. I said, "Shall we draw up an agreement?" Lyons replied, "Yes, it can be done, but what salary am I to have!" I observed, "You accepted our offer of £100 a year." Lyons then said he could not see his way clear to agree to that amount, as he could not live upon it. I proposed to the committee that we should pay him £120, the same salary as was being paid the head master. As to his travelling expenses I said I would call the committee together, and I did not believe they would allow him to be a loser in the matter. Mr. Goldberg, at my request, drew up an agreement on the spot. Lyons said he would think it over. On the following Friday the committee met again. Lyons treated us like a lot of niggers—kept us waiting while he had his lunch, and finally said he would have nothing to do with any contract, exclaiming, "I have had enough of Jewish committees, and I won't sign any agreement; in fact, I don't want your situation. I have another worth £20 a month." I thereupon tore the contract to pieces.

Cross-examined: I did not sign a joint affidavit on May 16 to the following effect: "The committee met again several times, but Lyons did not appear till about midnight, when he came to Goldberg's house in a state of intoxication." I know, however, that Mr. Lyons was somewhat intemperate, having seen him on one occasion the worse for drink.

"We the undersigned say that we know the said petitioner to be a man of grossly intemperate habits." Did you sign that statement in an affidavit?—No; I did not say so.

Mr. Justice Barry: This is certainly a very striking instance of the care with which affidavits ought to be read.

Christian Frederick Petersen, headmaster of the school, said: On the day of his arrival Mr. Lyons called upon me at the school. I am quite certain that he did not come to the school on the Monday, when he should have begun his duties had the contract been signed, and consequently Mr. Lazarus did not order him off.

Samuel Segel, late assistant master at the school, corroborated.

Samuel Lazarus having given evidence,

The case for the defendants was closed, and Mr. Molteno addressed the Court for the plaintiff.

The Court delivered judgment without calling on Mr. Innes.

The Acting Chief Justice said: The only doubt I have had in this case is as to whether we ought not to have granted absolution from the instance. But as there was some evidence on the record we thought it best to hear the defendants. The plaintiff claims that in February last he entered into a contract with the defendants as Hebrew teacher at their school at a salary of £150 per annum, and that he afterwards modified this contract, and agreed to take £120 and travelling expenses. The correspondence between the parties has been mainly by means of telegrams. From these it appears that a contract was entered into between plaintiff and defendants at a salary of £100 per annum, and that this was accepted by the plaintiff. The plaintiff, however, immediately afterwards withdrew from that contract, not by telegram but by letter, and asked for a salary of £150. From the telegrams which have been put in it would seem that the defendants were willing to give £150 if plaintiff had come down immediately. However, plaintiff did not do so, but allowed the matter to drop. This was in January. In February a friend of plaintiff, Mr. Pelham, telegraphed to defendants, "Is the berth still open?" to which the defendants replied, "Berth open; come immediately." On these two telegrams the alleged contract, if any, must clearly rest, and I fail utterly to see any mutual contract binding either party in these two telegrams. This is the foundation-stone of the whole action, and if that fails there can be no further proceedings. Plaintiff himself saw the difficulty, because when he arrived in Cape Town he endeavoured to arrange an entirely new contract. The utmost that can be said as matters stand is that there was an inchoate agreement between the parties, all the terms of which were not agreed to. That is clear from the conduct of all the parties. Plaintiff did not consider himself bound. If he was bound at any time his conduct was extraordinary. He made appointments to discuss the terms of the engagement and did not keep them. He says he went to the school to tender his services, but on the other hand several witnesses swear that he was never there. I cannot see how a contract can be made out of the two telegrams, and no subsequent contract was arrived at. It is unnecessary to go into the matter any further. Judgment will be for the defendants, but as this is an action *pro Deo*, there will be no order as to costs. This case has been a very good illustration of the very careless way in which affidavits are drafted for this Court. It would be much better if practitioners would be more certain of their facts before drawing up affidavits. One affidavit drawn for the defendants in this case is drawn in a way in which no practitioner should do it, the statements of three different persons being lumped in together without any means of distinguishing the statement of one from the statement of another, and when the statements are tested in Court, the parties declare they had no personal knowledge of the matter deposed of. If it had gone to a question of taxation, I should have marked my dissatisfaction of these affidavits by refusing to allow costs.

Mr. Justice Barry and Mr. Justice Upington concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendants' Attorneys, Messrs. Van Zyl & Buisinné.]

HOPE AERATED WATER COMPANY v. GIBBS. { 1894. August 21st.

Contract—Breach—Soda-water pump.

In May, 1893, the H. Co. *instructed* G. *to supply them with a pump to be used in the manufacture of soda water.*

G. *supplied the pump at a cost of £18 18s. 7d., but it did not give satisfaction.*

In September, 1893, the price of the pump not having been paid, G. *approached the* H. Co. *and offered to take back the pump.*

The H. Co. *declined this offer but entered into an agreement of settlement which provided that* G. *should repair the pump and keep it in good order for one year free of charge,*

the Co. *undertaking to pay the price on one* M. *certifying that the pump produced good commercial soda water.*

In October, 1893, the H. Co *paid* G. *£10 on account and in January, 1894,* M. *certified that it was not the fault of the pump if the soda water were not good and that he considered that* G. *should be paid.*

In an action brought by G. *against the* H. Co. *for £13 7s. 9d., £8 8s. 7d., being the balance due on the pump and £4 19s. 2d. being for work and labour done, the defendants pleaded that the pump had been tendered to the plaintiff, and claimed £20 in reconvention, £10 being the amount paid on account of the pump, and which they contended should be refunded, and £10 damages for breach of contract in not keeping the pump in repair.*

The Magistrate found as a fact that G. *had not fully carried out his undertaking to keep the pump in repair and consequently gave absolution from the instance on the claim for £8 8s. 7d., and judgment for £4 19s. 2d., with costs. He dismissed the claim in reconvention.*

An appeal from this judgment was dismissed, but that part of it having reference to the claim in reconvention was altered to absolution.

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town, in an action in which the present appellants, defendants in the Court below, were sued by the respondent for £13 7s. 9d., £8 8s. 7d. being the balance of an account of £18 8s. 7d., less £10 paid on account for work and labour done, and goods supplied by the plaintiff for and on account of the defendants at their special instance and request during the month of July, 1893 (as the summons alleged), as per account rendered by him to them, the said account having, in terms of a certain written agreement between the said parties, been referred to the decision of one Mulvihal, who has awarded that the said amount be paid by the defendants to the plaintiff.

2. The sum of £4 19s. 2d. being an account for work and labour done and performed, and goods supplied by plaintiff to defendants in the month of July and September, 1893, at their special instance and request.

The defendants pleaded:

1. General issue.

2. That action is premature in absence of certificate of Mr. Mulvihal.

3. Claim in reconvention £20, being £10 paid on account of pump which should be refunded because plaintiff has failed to keep in order and supply a new top as agreed, and £10 damages for breach of such contract; the pump has been tendered to plaintiff.

The plaintiff in reply denied the claim in reconvention, and also the tender of the pump.

The Assistant Resident Magistrate gave the following judgment: Absolution from the instance as regards claim in convention for £8 8s. 7d., and judgment for plaintiff, with costs, for £4 19s. 2d. The claim in reconvention not being sufficiently established by evidence is dismissed.

The facts appear sufficiently from the Magistrate's reasons, which were as follows:

In this action the defendants are summoned for the sum of £13 7s. 9d., being (*a*) £8 8s. 7d. the balance of an account for work and labour done and performed and goods supplied, and (*b*) £4 19s. 2d. for work and labour done by plaintiff for defendants.

The defendants plead (1) the general issue, (2) that action is premature, and (3) claim £20 in reconvention.

In May, 1893, the plaintiff, an engineer, was asked by defendants, who carry on business as "The Hope Aerated Water Company," to supply them with a new pump to be used in the manufacture of soda water. A new pump was duly supplied and fixed up by plaintiff, and in July, 1893, plaintiff sent in his account for the sum of £18 18s. 7d., and not receiving a remittance in settlement again wrote to defendants on 22nd August, 1893, for payment of his account.

Defendants having made certain complaints about the pump the plaintiff at the request of defendants overhauled the entire machinery, portions of which he found defective.

On 14th September, 1893, the plaintiff and his attorney approached defendants with a view to a settlement and offered to take back the pump. This the defendants would not allow, and subsequently on the same day a memorandum of settlement was signed by plaintiff and defendants, which provided *inter alia* that plaintiff "should repair pump and deliver same free of charge on 15th September in a workmanlike manner," and defendants agreed to pay for same £18 8s. 7d. upon Mr. Mulvihal certifying that the soda water passed through the pump is good commercial soda water, and the fact that Mr. Mulvihal certifies that it produces good commercial soda water will be decisive of the pump being of good and workmanlike char-

ester. Plaintiff further guarantees to keep pump in good order for one year free of charge.

On the 17th October plaintiff again wrote to defendants for a settlement, and on the 25th October defendants by letter forwarded £10 to plaintiff's attorney in part payment and promising to pay balance as soon as pump is completed.

On 13th January, 1894, Mr. Mulvihal is asked for his certificate in terms of the memorandum of settlement when he certifies as follows: "Having examined the work done by Mr. Gibbs at the Hope Aerated Water Company I certify that it is no fault of the pump if the soda water is not good. I consider Mr. Gibbs should be paid."

I consider that plaintiff has partly failed in his agreement in so far that he did not keep the pump in good order as guaranteed in the memorandum of settlement, and therefore cannot recover the balance of £8 8s. 7d. until the pump is restored in good working order.

As however the defendants had the use of the pump for some six months and declined to return it to plaintiff at the time he sought a settlement, and actually paid plaintiff £10 in part payment of the pump after having used it for months, I consider they cannot now claim a refund of the £10.

The plaintiff's further claim of £4 19s. 2d. is for work and labour done independent of the pump, and is not included in the memorandum of settlement.

From this judgment the defendants now appealed.

Mr. Rose-Innes, Q.C., in support of the appeal.

Mr. Graham for the respondent.

The Court dismissed the appeal.

The Acting Chief Justice said: In this case I think the Magistrate's judgment is substantially correct. The claim in this case is founded on two things. The first part of the claim is the balance of the purchase price of a pump; the second is for work and labour done. The Magistrate gave judgment for work and labour done, and there seems no ground for upsetting this part of the judgment. As to the claim for the balance of the purchase money, the Magistrate gave absolution from the instance. From the pleadings it appears that the plaintiff made a pump for the defendants. This pump was delivered before July, 1893. Disputes took place as to the efficiency of this pump, and in September, 1893, the parties entered into a new agreement. By this agreement the defendants undertook to pay the plaintiff the price of the pump on a certificate from Mr. Mulvihal. The plaintiff agreed to keep the pump in repair free of charge for twelve months, and he also agreed that if the top of the pump gave out, to supply a new one free of charge. With this agreement before us, defendants having taken this pump knowing its deficiencies, and having entered into a new agreement, I do not think they can now come forward and claim to return the pump. Indeed, when the dispute arose the plaintiff offered to take back the pump and settle matters that way. Defendants at that time refused. On this claim the Magistrate was quite right in giving absolution as the plaintiff has not shown that under this new agreement of September, 1893, he is yet entitled to demand from the defendants the balance of the purchase price of the pump. As to the claim in reconvention, that was dismissed, and that part of the judgment will be altered to absolution from the instance, as the defendant may still be able to substantiate a claim for damages. With this alteration the appeal must be dismissed with costs.

Their lordships concurred.

[Appellants' Attorney, D. Tennant, jun.; Respondent's Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Mr, Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

MILLS V. COLONIAL GOVERNMENT. { 1894. August 22nd. „ 23rd.

Negligence—Railway accident—Destruction of mules—Damages—Contributory negligence.

This was an action instituted by Dr. Mills, of Somerset West, against the Hon. John Laing in his capacity as Commissioner of Public Works, to recover £60 damages for the destruction of two mules and a foal, killed by one of the Government trains.

The declaration alleged that the plaintiff is the owner of a certain farm near Somerset West, across which a line of railway leading to Sir Lowry's Pass has been constructed, and is worked by the Colonial Government.

The said line of railway where it crosses the plaintiff's farm is fenced on both sides, and at a certain spot upon the said farm gates have been erected by the Colonial Government, so as to afford a crossing on the said line.

On or about March 13, 1894, three mules and a foal belonging to the plaintiff were being lawfully and carefully driven through the said gates and across the said line of railway by a servant in the employ of the plaintiff.

While the animals were on the line and were being driven across it as aforesaid, a railway train which was being driven by a servant of the Crown, and was being run by and for account of the Colonial Government, approached the said crossing, the said animals took fright at the said train, and without any default on the part of the person in charge of them, they ran up the line in the same direction as the said train, but a considerable distance ahead of it.

The driver of the said train so wrongfully and negligently drove and managed it that two of the said mules and the said foal were run over and killed.

The said animals were killed solely through the wrongful and negligent conduct of the driver aforesaid, who was at the time acting in his capacity within the scope of his authority as a servant of the Crown, and the plaintiff says that the defendant in his said capacity is liable for the wrongful acts of the said driver.

The value of the animals so destroyed was the sum of £60, and the plaintiff says that he has sustained damage to that amount.

The plaintiff claimed:

(*a*) £60 damages.

(*b*) Alternative relief, with costs of suit.

The defendant in his plea admitted the formal allegations in the declaration, and specially pleaded that by section 1 of Act 41 of 1889, it is enacted that the defendant is only bound to indemnify the owner of stock destroyed or injured by any train running by daylight, if the part of the line at which such destruction or injury takes place is unfenced at that time, and if no compensation shall have been at any time paid to any person by the Colonial Government for or in respect of the right to construct such part of such line.

The place where the plaintiff's animals were destroyed was fenced on both sides at the time, and the sum of £100 had been paid for compensation, as aforesaid, to a predecessor in title to the plaintiff.

The said gates were and are erected on the plaintiff's said farm for the convenience of the owner thereof, and the keys of the said gate were delivered to the predecessor in title to the said plaintiff.

The defendant further alleged that on the 14th March, 1894, through the negligence and default of the plaintiff and his servants, several animals (exceeding twelve in number) were allowed to trespass and stray through one or other of the said gates on to the line of railway.

The defendant, through his servants, exercised all due and proper caution in running the said train, and exercised every care and endeavour to avoid injuring the said animals so straying and trespassing on the said line, but was unable to avoid killing two mules and a foal among the said animals, the property of the plaintiff.

The said animals were destroyed without any neglect or wrongful conduct of the defendant or his servants.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The plaintiff excepted to the statutory defence raised in the plea, as being bad in law, irrelevant, and embarrassing, and as to the remainder of the plea, he joined issue with the defendant.

Mr. Rose-Innes, Q.C., with whom was Mr. Graham, appeared for the plaintiff.

Mr. Juta, Q.C., Attorney-General, and Mr. Giddy for the defendant.

Dr. Walter Herbert Mills said that he was engaged in farming at Somerset West. The railway from Eerste River to Sir Lowry's Pass crosses his property, and is fenced on both sides. The tracings of the locality (produced) were correct. From the gate marked in the plan a train would be seen for the first time when it emerged from the bush and crossed the culvert. There were two gates, of which he kept the keys. He knew the animals which were killed, and valued the mules at £25 each, and the foal at £10.

Cross-examined: On the day of the accident there were other stock grazing on the sea side of the line, which was the only veld he had for that purpose. He could not account for the fact that there were sheep on the line too. No complaints had been brought against him, owing to the negligent way in which the gates were kept open.

John Jacobus de Villiers, manager to Dr. Mills, deposed that between five and six o'clock in the evening of the 13th March he was standing in the garden, about 500 or 600 paces from the line, when he saw the train coming across the culvert. He could not see gate No. 23, but the engine-driver would have been able to see it. Shortly afterwards, owing to a communication from a boy named Van Dam, he went to gate No. 23, and thirty-six paces away from it found a mule lying on the ground with its leg broken. Another 150 paces away he found a second mule with its front and hind legs completely smashed, while sixteen paces further on lay the foal in a disabled condition. He had the animals destroyed, as it was quite impossible to do anything for them. A letter was written to the

railway authorities that evening attributing the accident to the culpable negligence of the driver, and estimating the loss at £60.

The boy Bandan said he had been employed by Dr. Mills for about fifteen months to look after the stock. On the evening of the accident he was taking the mules home. The gate was closed on the sea side, and he opened it, then crossing the line to open the gate on the other side. The mules followed. He first saw the train as he was standing at the second gate and about to open it. No whistle was sounded, and the train was not far off when he saw it. The mules ran up the line, and he went after them. He was nearly run over himself, and fell into a diteh, the engine passing quite close to the spot where he fell. The mules and the foal were run down.

Cross-examined: Unless the driver whistled it was impossible to hear the approach of a train. He had never been spoken to about negligently leaving the gates open.

Jacobus Smuts, a passenger by the train which ran over the animals, said that one could see quite well from the culvert to gate No. 23. His attention was attracted on the evening in question by the noise of gravel dashing against the carriage window. On looking out, he saw some mules running in front of the engine. The train stopped shortly afterwards, being pulled up suddenly. On the following day he went over the line where the accident occurred, and found that the distance from the gate to the culvert was 400 yards. He could see by the spoor that the mules and the foal must have run along in front of the engine for 150 yards. He was sure that no whistle was blown until after the accident occurred.

Johannes Paulus Cilliers, of Paarl, another passenger by the train, and Kippy Cullings, herdsman in the employ of the plaintiff, corroborated.

A. J. van Blerk, who witnessed the accident from the Halt, said the driver blew his whistle as the train approached the first gate. He saw no mules on the line at that time. He first noticed them running in front of the engine after the train had passed the second crossing.

Johannes Haupt said he was standing at the Halt Station when he noticed the train coming through the culvert from the bush. He heard no whistle. The train was running at about the usual speed when it ran the animals down. From the gate to the spot where the first mule was knocked down was from thirty-four to thirty-six paces.

For the defence,

John Dymon, an engine-driver of fifteen years' experience, said he was driving the train at the time of the accident. It was almost level between No. 23 gate and the Halt, and he could pull up there within 150 to 180 yards. After leaving Somerset West on the evening in question, he blew the whistle, as usual, several times. After passing gate No. 23, his attention was first directed by the fireman on the other side of the engine to the fact that there were animals on the line. They were then only twenty-five yards off. He shut off steam immediately, applied the brake, and did everything he could to stop the train. As the engine turned the curve he was able to catch a glimpse of the mules in front of the engine, and almost immediately the train struck them. The train then came to a standstill. He got down to see that the line was clear. One of the animals that was knocked down walked off the line on three legs. Coming from the bush one could see the first crossing but not the second, which could only be seen on passing the first. He saw no animals crossing the line, and he knew nothing of their presence on the line until his fireman called out to him after they had passed the second crossing. He believed the animals had been grazing in the sluits. He had frequently found this gate open and cattle straying on the line. He had sometimes stopped the train, and sent the fireman to drive them away. It was quite impossible for him to have avoided the accident or to have seen the mules before.

Cross-examined: He was in charge of the cattle train that was wrecked at Hex River. In December, 1892, he ran into a wagon, and last winter he ran over a horse at Eerste River. These accidents were all owing, he supposed, to the impossibility of pulling up sooner. It was impossible to see the crossing at gate 23 until after rounding the curve at gate 22.

John Mitford Miller, fireman of the train, said that the whistle was blown at each crossing. On the evening of the accident he first saw animals on the line just as they were passing No. 23 gate. They were not more than twenty-five yards off. He saw no cattle crossing the line. He had frequently seen cattle browsing in the ditches on either side of the line. Immediately he informed the driver of what he had seen, the driver pulled up the train. Everything possible was done to avoid the accident, which was caused by the mules dashing out of the ditch on to the rails in front of the train. The gates were open on both sides of the line at No. 22 crossing.

John Carelse, assistant ganger on the line where the accident occurred, said that gates Nos. 22 and 23 on the plaintiff's property were frequently left open, and he had repeatedly found

cattle straying on the line unattended. He had spoken to the boy Bandan on the subject. Bandan answered rudely. He closed No. 23 gate only half an hour before the train passed.

Mr. Rose-Innes, Q.C., was heard in support of the plaintiff's case.

Judgment was given in favour of the Government.

The Acting Chief Justice said: In this action Dr. Mills seeks to recover from the Government the value of two mules and a foal killed by an engine driven by Government servants on the line between Somerset West and the Sir Lowry Pass. The defence which the authorities took up in the first instance was based on Act No. 41 of 1889. The Attorney-General in court candidly gives up this defence, and, I think, properly so, because in my opinion this Act is no defence to any negligent act on the part of the Government servants. The intention of the Act seems to me to be to throw upon the Government the burden of paying compensation for stock killed on unfenced lines, where no compensation has been paid by the Government for permission to run the line over private property. In other words, it throws upon the Government the burden of seeing where there is no fencing and where no compensation has been paid that the trains cross the farms by daylight without doing any injury. But where the line is fenced, and compensation has been given, the common law still applies, and if negligently or wilfully the engine-drivers or other servants of the Government should kill any stock on the line, the Government is bound to pay compensation for the stock so killed. The action, therefore, rests upon the allegation of negligence on the part of the Government officials—the engine-driver and fireman—in conducting this train. The evidence is contradictory as to how the stock came upon the line. On looking into all the circumstances of the case it seems to me that the most likely theory is that the stock were within the enclosures grazing in the ditches at the time the train came along. Whether they got in through gate No. 22 or No. 23 I am not prepared to say. But being there they were wrongfully on the line, and to that certain extent there is ground for the contention that there was contributory negligence on the part of plaintiff or of his servants. But, at the same time, if the defendant's servants could by the exercise of caution on their part have avoided the accident, the fact that the mules were wrongfully on the line would not have justified them in killing the stock. The question is not therefore settled by the fact of the trespass, but it comes back to this. Was there negligence on the part of the engine-driver and fireman? Looking at the fireman's evidence, corroborating as it does the story of the driver, I think everything possible was done by them to prevent this accident. The train was, it is true, running at rather a high rate of speed—23 or 24 miles an hour—but it has been proved that this was time-table speed, that the train passed the plaintiff's farm at the ordinary time, that the herds knew the time the train was expected to pass — only one train passed a day — and that as soon as ever the mules were discovered on the line every attempt was made to stop the train. There has been an endeavour to show that the train went further than it need have done before it was drawn up, but my impression of the evidence is, that the space which intervened between the spot at which the mules were discovered and the spot at which the train was brought to a standstill could not at the outside have been more than 200 yards, and that under the circumstances I think the engine-driver did his best to draw up the train as quickly as he could on discovering the obstacle ahead. The strongest point made against the defendants was that as the train was passing these crossings and approaching a station, it ought not to have been run at this speed without taking unusual care. On the other hand it may be argued that when the line is fenced in, and there are only private crossings, the gates of which are generally kept closed, the engine-driver might fairly assume that the line was clear. He would not probably be keeping quite so strict a look-out as if he were running through an unfenced farm. If, however, negligence had been brought home to the driver, I should, notwithstanding all this, have held the Government responsible. But in my opinion the plaintiff has failed to prove such negligence as to require us to cast the Government in damages for this accident. Of course, one regrets that valuable stock should be killed; at the same time the Government is not answerable where its officials are not to blame. Judgment must be given for the defendant with costs.

Mr. Justice Barry: I concur in the judgment. I am not surprised that Dr. Mills should have brought this action after hearing the statement of Bandan, but the question is whether he has proved his case. The first attempt was to prove that there was no negligence on the part of the plaintiff, and that the defendants were aware that the train went past this crossing at a high rate of speed. It might have been supposed that a very careful driver would have eased down and would not have gone at that pace, especially as he was near a station. On the other

hand, there is the proved circumstance that the driver whistled at a considerable distance from this very spot, and that that whistle would ordinarily be sufficient to induce a man in the act of going through the gateway either to desist or to hurry on. In addition, we have the evidence of the fireman—and it is pleasant to find in him a witness whose evidence is believed in by both sides—that both No. 22 gates were open. The driver of the train passing these gates open would naturally infer that the other gates would be closed, because these were the gates which were being used, and Dr. Mills's servant would not be so utterly negligent as to leave them open. On they went, and when they reached the second gates they found them closed. About then the fireman saw the mules rush out of the ditch on to the line, and he at once gave the alarm. Everything was done, in his opinion, to stop the train. It is true that Mr. Innes, piecing together the evidence of various witnesses not unfairly, gives one cause to think that possibly the driver might have stopped the engine a little sooner, but I think the evidence of the fireman shows that he did all that could be done under the circumstances. If Bandan's statement were taken alone, it would appear that there had been no negligence on the part of the plaintiff whatever. Unfortunately Bandan very soon showed that his evidence was not to be relied upon. He told one lie after another. First of all he said he did not hear the whistle. I think the evidence of Mr. Van Blerk shows clearly that the whistle was sounded, and I have no doubt that he heard it, and that it expedited his movements on that occasion. Again, he said he had locked and unlocked the gates with the keys. He had no keys; they were with his master. Then he said he did not meet the ganger; here again he was in fault. One had only to look at him in the witness-box to see that he was lying. He did not look at the man to see whether he could recognise him or not, but looked at the Court to try and find out whether it would be best to say one thing or the other. Bandan had deceived the plaintiff, and he is the cause of the action, because if the plaintiff had known in what position Bandan had placed him this case would not have been brought. Mr. Innes has very ably argued the case on the supposition that even if Bandan's evidence is not to be relied upon, sufficient negligence has been proved on the part of the defendant to make him liable. If it had been shown that the defendant could have avoided the accident, notwithstanding the negligence on the part of the plaintiff, the Government would have been liable. Therefore, coming to the conclusion as I do that the mules were actually trespassing on the line, which the Government had paid for by compensating the owners at the time, and were not on the crossing at all, and that it has not been proved that the defendants could have avoided this accident, I must come to the conclusion that the plaintiff has failed to prove his case. If it had appeared that the driver was reckless, it is quite possible that wilful conduct of that kind might amount to cruelty to animals, and possibly to malicious injury to property, and if it was proved that a driver had been so guilty, he might be not a witness but an accused in a criminal court. But no such recklessness has been proved in this case, and for the reasons already given I have come to the conclusion that the defendants are entitled to the judgment of the Court.

Mr. Justice Upington concurred.

[Plaintiff's Attorney, G. Montgomery-Walker; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

DUTCH CHURCH OF CALVINIA V. BICCARD. } 1894. August 23rd.

Mr. Tredgold moved for judgment for the sum of £387 1s. 2d., with interest from January 29, 1894, balance of certain goods sold by the defendant as auctioneers.

Granted.

BRAND V. COWLING AND CO.

Mr. Molteno asked for judgment for the sum of £25 2s. 5d. for work done.

Granted.

CAPE TOWN HARBOUR BOARD V. COWLING AND CO.

Mr. Jones moved for judgment for £8 18s. 6d., water supply account rendered, and £24 amount due for rent of offices, interest, &c.

Granted.

ADMISSION.—*Ex parte* WARD.

On the motion of Mr. Graham, Mr. Daniel Ward was admitted an advocate of the Supreme Court, the oath to be taken before the Administrator of British Bechuanaland.

GENERAL MOTIONS.

IN THE MATTER OF THE MINOR H. C. LOUBSER.

Mr. Tredgold applied for authority to the Master of the Supreme Court to pay out to the tutor dative, from money to the credit of the minor in the Guardians' Fund, an annual amount in aid of his maintenance and education.

The order asked for was granted on the terms of the Master's report.

THE PETITION OF EVA WHITTLING.

Mr. Watermeyer asked for leave to applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

The order was granted.

IN THE MATTER OF THE CAPE OF GOOD HOPE BANK.

Mr. Webber asked for authority to the official liquidators to file certain claim of Thomas F. Medcalf in respect of a balance to his credit in the said bank omitted to be lodged within the period fixed by the Court.

The order was granted.

IN THE MATTER OF THE MINOR JOHN A. COSTELLO.

Mr. Webber applied for the sanction of the Court to the sale by the father and natural guardian of certain farm called Cibini, situated in the district of Xalanga, the property of the minor, and for leave for him to invest the proceeds for the minor's benefit in landed property.

The Court granted an order permitting the sale, the proceeds to be invested in the Guardians' Fund until re-invested with the Master's approval.

IN THE INSOLVENT ESTATE OF JAN A. J. VAN RENSBURG.

Mr. Buchanan asked for the appointment of a provisional trustee with full power to finally liquidate and administer the said estate, the trustee originally elected being dead, or otherwise for an order authorising the Master to call a meeting for the election of another trustee.

The Court made no order, the usual procedure to be followed.

THE PETITION OF CHAS. CARL.

Mr. Tredgold moved for a rule *nisi* requiring his wife to show cause why applicant shall not be admitted to sue *in forma pauperis* in an action against her for divorce by reason of her alleged adultery.

The case was ordered to stand over for a week

DAVIS V. DAVIS. { 1894. August 23rd.

This was an action for divorce on the ground of adultery. It was part heard on the second day of term, but owing to the absence of the principal witness it was postponed.

Mr. Benjamin, for the plaintiff, said the witness was still unable to be present, as she was suffering from internal hemorrhage. He produced a medical certificate showing that she was unable to be present, and asked to be allowed to read her affidavit.

The Court did not consider the medical certificate to be sufficient evidence that the witness would not be able to appear at some future time, and the case was adjourned *sine die*.

On the following day (August 24) Dr. Hasell was called and testified to the inability of the plaintiff to be present owing to illness. Her affidavit was then admitted and the Court granted a decree of divorce with costs.

Ex parte BRANDT. { 1894. August 23rd.

This was the petition of Charles William Frederick Brandt *alias* Brown.

The petitioner was married in England in the year 1872 to one Lavinia Greenwood, then a widow.

He and his wife came to the Colony in 1882, she died intestate in Port Elizabeth on the 8th January, 1892, and he was appointed executor dative.

The deceased, whose maiden name was Ivy, had no children by either of her husbands.

The petitioner alleged that he was born in Germany, that his name was Charles William Frederick Brandt, but that owing to constant intercourse with English-speaking people he came to be known as Brown, and for many years passed as William Brown.

The prayer was that the Master might be directed to pay the petitioner the balance to the credit of his wife's estate, namely £119 15s. 5d.

The marriage certificate of Charles William Frederick Brandt and Lavinia Greenwood was attached to the petition and was the only proof of identification offered.

In the death notice the name Lavinia Brown not Brandt, appeared.

Mr. Buchanan for the petitioner.

The Court made no order, the matter being adjourned *sine die* for further information regarding the petitioner's identity.

[Petitioner's Attorney, G. Montgomery-Walker.]

REGINA v. HAVENGA. { 1894. Aug. 23rd.

Liquor licence — Bottle store—Sale after prohibited hours—Evidence sufficient to justify conviction.

The Court on appeal refused to quash a conviction for contravening the Liquor Licensing Acts where, although the evidence of the contravention was not strong, still there was sufficient, in the opinion of the Court, to justify the Magistrate in convicting.

This was an appeal from a sentence passed by the Resident Magistrate of Richmond, in a case in which the appellant, Johannes Jacobus Havenga, was charged with contravening the provisions of Act 23 of 1883, section 73, and Act 25 of 1891, sections 1 and 3, and the conditions fixed by the Licensing Court of Richmond, by wrongfully and unlawfully selling a certain quantity of brandy at a time other than between the hours fixed by the Licensing Court, as specified in his (Havenga's) bottle-store licence for the year 1894.

One Putter, to whom the brandy was alleged to have been sold, gave the following evidence:

I am a trader residing at Richmond. I know the bottle store of accused. I was in the shop of accused on Saturday, the 14th instant, at 5.15 p.m. I went for the purpose of getting half a bottle of brandy. I did not get the brandy. There were a number of persons in the shop, also Ellen du Plessis. I had a bottle when I went into the shop. I had the bottle in my trousers pocket.

When I went back from Havenga's shop I touched at Mrs. Preiss' shop. I then had a bottle containing brandy in my possession. I did not tell Mrs. Preiss and H. Thomas that I had bought the brandy at four p.m. but that I had then only fetched the brandy at 5.30 p.m. I deny distinctly that I did not speak to Hill and tell him that I had bought the brandy, during the day and that it was delivered to me after hours

Cross-examined: I bought that Saturday morning a bottle of brandy, and before five p.m. I wanted to get more brandy, but as I had no money and wanted credit the accused refused me, saying he had only a bottle of brandy for his customers.

After five p.m. I tried to get a half bottle but did not get it, as Havenga said it was too late. I walked through the shop to the door leading into the liquor store and then put down the bottle I had with me, which was almost half full with brandy. I wanted to fetch the bottle there, but Havenga would not allow me to get it, he sent his nephew for the bottle, who handed me the bottle. This was after five p.m. I asked Ben Havenga for brandy, but he told me it was after hours. I asked Havenga's son Wessel, who also told me it was too late and closed the door of the wine store. When I passed Mrs. Preiss she called me.

Re-examined: The door of the wine store was still open after five p.m.

When I came to Mrs. Preiss I had the bottle in my pocket; she did not see the bottle. I do not know whether H. Thomas saw the bottle.

I did not see Absolom at the time, he might have been there.

Ellen du Plessis, on whose evidence the Magistrate convicted, sworn, stated: I am thirteen years of age. My parents live right opposite Havenga's shop. I was in Havenga's store on Saturday the 14th inst. when witness Putter came there. I think it was about 5.30 p.m. I am certain it was past five p.m. Putter asked Ben Havenga, a clerk of Havenga's, for a bottle of brandy. Ben Havenga said it was too late. Mr. Havenga the accused replied in Dutch, "Toe maar," which I understood to mean that Ben Havenga was to give Putter the brandy. I then went out. When Putter spoke to Ben Havenga he (Putter) was standing next to me.

Cross-examined: I do not carry a watch. I know it was five o'clock, because my mother told me to lay the table as it was five o'clock, and that was before I went to Havenga's. Putter had the bottle in his hand. I saw the bottle. It was a quart bottle. Putter asked for a bottle of brandy. I heard Havenga say "Toe maar." The persons I saw in the shop at the time were Putter, Ben Havenga, Wessel, Havenga, accused and I.

Elizabeth Preiss, sworn, states: I have a retail shop licence and a bottle-store licence in Loop-street. Havenga, the accused, also has similar licences.

The first witness Putter came down the street from the direction of Havenga's. Thomas called Putter but he would not come. Besides Thomas, my storeboy Absolom was also there. Putter had a bottle wrapped in a white paper. I asked him what he had in the bottle. He said brandy. He said he had bought it at Havenga's. This was between 5.30 and 5.35 p.m. Putter said that he had bought the brandy at four o'clock,

The accused pleaded not guilty; he was found guilty, and sentenced to pay a fine of £5, or eight days' imprisonment.

From this sentence the present appeal was brought.

Mr. Schreiner, Q.C., was heard in support of the appeal.

Mr. Giddy for the Crown.

The Court dismissed the appeal.

The Acting Chief Justice delivered judgment as follows: The accused in this case was charged with selling liquor after hours, and the only point raised on appeal is, whether there was evidence justifying a conviction. I am unable, after reading the record, to say that there is no evidence on which to found the judgment. I will take the man Putter's evidence, which amounts to this: He went into a liquor store after five o'clock, the closing hour. He took a bottle in with him; he asked the storekeeper for brandy, and a witness, whom the Magistrate believed, says the latter said, "Toe maar," meaning "Let him have it." The man got the bottle with brandy in it, came out, and went away. Then there were the additional facts that when he went into the store he had a shilling in his hand, and that he came out with the brandy, wrapped up carefully in paper. It is said there was no evidence that the bottle contained brandy. On that point we have the evidence of Putter himself, and the fact that none of the witnesses for the defence deny that there was brandy in the bottle. Under those circumstances I think the evidence before the Magistrate justified him in drawing the conclusion that there was a sale. The case is not a very clear or strong one, but I think after looking carefully at the evidence we are not justified in saying the Magistrate had no evidence on which to found the verdict. The appeal must be dismissed.

Mr. Justice Barry concurred. He said: In this case we have a man fond of liquor coming into the store after five o'clock in the evening wanting to buy brandy, and with a shilling in his hand. The answer was, "Toe maar" (let him have it). You then have the owner of the store sending into the bottle store, and the man coming out with the brandy. The bottle is wrapped up in paper and handed to this man, and is afterwards found in his possession. The witnesses for the prosecution say that in that bottle was brandy, and all the other circumstances of the case go to prove that that was the case. The defence set up, if believed, would have constituted a complete defence, but the Magistrate disbelieved it. I apply to this case a certain amount of knowledge of human nature which one either has, or fancies he has, and I think that the defence has been concocted, and the Magistrate thought so too. Believing that, I decline to be imposed upon by a defence which I believe to be false.

Mr. Justice Upington concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

CONSTABLE v. THERON. { 1894. August 28rd.

Work and labour—Settlement — Counter-claim

Where judgment had been given in a Magistrate's Court for the original defendant on a claim in reconvention, the amount claimed having been included, as the appellate Court found, in a previous settlement arrived at between the plaintiff and the defendant, the Court altered the Magistrate's judgment to judgment for the defendant in reconvention and gave him his costs of appeal

---

This was an appeal from a decision of the Resident Magistrate of Sutherland in an action, in which the present appellant, plaintiff in the lower Court, sued the respondent (defendant) for the sum of £15 7s. 6d., £7 17s. 6d. being for work done and services rendered by the plaintiff and his servants to the defendant at his special instance and request in the months of November and December, 1893, and £7 10s. being for the facing of a certain dam, the property of the defendant.

The defendant denied liability, and claimed in reconvention the sum of £13 15s., made up as follows: £4 10s., grazing of 150 sheep at 5s. per 100 per month for twelve months; grazing of ten donkeys for the same period at 1s. each per month, £6; hire of a Scotch cart and two mules for six days at 10s. per day, £3; hire of a man for two days at 2s. 6d. per day, 5s.

It appeared from the evidence that the plaintiff undertook to construct a dam for the defendant for £22. This work was done and, according to the defendant, paid for on 28th March last when a settlement was arrived at, the amount including all work connected with the dam. The plaintiff's case was, however, that facing the dam was not included in the original contract, and for the latter work he claimed £7 10s. He disputed all the items in the counter-claim, and alleged that he had not been paid for the work which he had done for the defendant in November and December, 1893, though he admitted that a kind of settlement was arrived at in January, 1894.

The defendant, on the other hand, deposed that he had paid the plaintiff all the moneys due to him and he owed him nothing, but, on the contrary, had a claim against him for £13 15s., as specified in his claim in reconvention.

The Magistrate dismissed the plaintiff's claim, and gave judgment for the defendant on his counter-claim, with costs.

The following were the Magistrate's reasons: The defendant was sued for the sum of £15 7s. 6d., for work done and services rendered in November and December, 1893, and February, 1894. The case was decided upon the evidence. I believed the witnesses for the defendant—not these for the plaintiff—and gave judgment accordingly.

The plaintiff now appealed.

Mr. Rose-Innes, Q.C., was heard in support of the appeal.

Mr. Sheil for the respondent.

The Court allowed the appeal.

The Acting Chief Justice said: This case depends a good deal upon the evidence, and we are bound by the Magistrate's finding so far as it is supported by the evidence. It is common cause between the parties that there was a settlement. Plaintiff fixes it in January, defendant says it was in March. The Magistrate believed the defendant. If it was the case that there was a settlement in March it disposes of the plaintiff's claim, and the Magistrate has correctly given judgment for the defendant with costs. I do not think we can interfere with that part of his judgment. As to the counter-claim, defendant himself says the settlement was in March, and the counter-claim he puts in shows items, all of which came due before March and before the settlement. From the defendant's own evidence this settlement included the matters set up in the claim in reconvention. It is evident that the items in the claim in reconvention were only brought forward to meet the claim in convention. The Magistrate ought not therefore to have given judgment for the amount of the counter-claim. So far the appeal will be allowed with costs, and the judgment of the Court below altered to judgment for the defendant on the claim for convention, with costs, and judgment for the defendant in reconvention. As to the costs in the Court below, plaintiff should pay them, because if this action had not been brought the counter-claim would not have been set up. The appellant will have his costs of appeal.

Mr. Justice Barry: In deference to the rule that a finding on the facts ought not to be disturbed, except where it is clearly proved that the Court below was in the wrong, I shall not disturb the Magistrate's finding on the claim in convention, but I confess I hesitate to say that I should have agreed with him in that finding in the Court below. As to the claim in reconvention, this was set up solely because of the claim in convention, and the Magistrate came to a conclusion upon that which is wholly inconsistent with every probability in the case, and he was clearly wrong.

Mr. Justice Upington called attention to the heavy bill of costs in the Court below, the total taxed against the plaintiff being £14 10s., being made up principally of witness expenses for the plaintiff and his family.

The Court accordingly ordered each party in the Court below to pay his own costs.

[Appellant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

PROCTOR v. CHRIST. { 1894. August 24th.

Libel—Letter in newspaper—Inexperienced painter—Ignorance.

In January, 1894, tenders were called for by the Colonial Government for the performance of certain external painting work at the Houses of Parliament, Cape Town.

P. *and* C. *together with other painters tendered for the work and* P's. *tender was accepted.*

No notice was given to the public as to who was the successful tenderer, nor was C. *aware that* P. *had obtained the contract.*

Some time after P.'s *tender had been accepted* C. *was passing the Houses of Parliament while the painting work was being carried out, and noticing the caretaker* (himself an experienced painter of which fact C. was unaware) *giving one of the painters instructions as to how he should do his work, immediately concluded that the contract had been given to the caretaker, and being of opinion that this was unfair to the painters of Cape Town, wrote a letter to the editor of the "Cape Times" in which he remarked* inter alia *that the lowest tenderer for the painting work at the Houses of Parliament was not an experienced painter, and otherwise described him as being as unfit to do the work as a draper would be to undertake a contract for printing.*

Held, *in an action for damages for libel instituted by* P. *against* C., *to which the defendant pleaded justification that the*

words complained of amounted to a technical libel, and that C.'s *ignorance that* P. *was the successful tenderer was no excuse in law.*

This was an action for £500, damages for libel instituted by Mr. James Proctor, of Observatory-road, against John Christ, of Cape Town.

Both parties to the suit are painters.

The declaration alleged that in or about the month of January, 1894, tenders were publicly called for by the Colonial Government for the performance of certain external painting work at the Houses of Parliament, Cape Town.

The plaintiff and the defendant both tendered for the said work, the tender of the plaintiff was accepted, and he thereafter proceeded duly to execute the said work in terms of his contract.

On or about the 27th April, 1894, a certain letter was written and published in the "Cape Times" newspaper, signed "Tenderer for Painting." The said letter was so written and published by the defendant.

In the said letter the following false, malicious, and defamatory statements appear: . . "Take again the contract for the painting-work outside the Houses of Parliament. . . . What I wish to say is that the lowest tenderer for this work, I am quite certain, was not an experienced painter, and as the work was described to be done by painters, surely one of the recognised firms should have got the contract. What would you say if a draper, who knew nothing about newspaper-work, got the Government contract for printing? Yet this is equivalent to what has taken place, and has been the custom for some time. . . . . I know of thirty or forty real workmen, who waited on the chief firms to get work, believing that this contract would be given to one of these firms, and to a real master painter. They have, however, met with surprise and disappointment."

The said defamatory words were falsely and maliciously, and with intent to injure the plaintiff, written and published by the defendant of and concerning the plaintiff, who is the tenderer and contractor therein referred to, and were understood by readers of the said paper to refer to the plaintiff. The defendant intended the said words to mean, and they do mean, that the plaintiff has no experience as a painter, and was not a real master painter, that he was incompetent properly to carry out the work which he had contracted to perform, and that he was not a fit and proper person to be entrusted with the painting work hereinbefore referred to.

The plaintiff, who is an experienced and competent painter, has been injured in his name and reputation by the false, defamatory, and malicious words aforesaid and has suffered damages in his trade and otherwise in the sum of £500.

The plaintiff claims:

(*a*) Payment of the sum of £500 for damages as aforesaid.

(*b*) Such alternative relief as to this honourable Court may seem meet.

(*c*) Costs of suit.

The defendant in his plea admitted the formal allegations in the declaration, and that he wrote the letter of the 27th April, but he denied that the words contained in the letter were false, malicious, or defamatory, and he said they were fair and proper comments and criticism upon a matter of public interest, to wit, the manner in which, and the circumstances under which, work of this nature for Government was executed; that the said statements were written by him in the public interest without malice, and he craved leave to refer to the whole of the said letter in proof thereof.

He denied the innuendo generally, and that he wrote the letter* with the intention of injuring the plaintiff, and said that when he wrote the letter, he did not know who the successful tenderer was, nor that the plaintiff was carrying out the contract.

---

*The full text of the letter is as follows:—*Rep.*

A TRADE GRIEVANCE.

TO THE EDITOR OF THE "CAPE TIMES."

SIR,—In the interest of the recognised master painters of Cape Town, I shall feel obliged if you allow me to ventilate what appears to me a matter of public concern. My complaint is with reference to the manner in which contracts for public works are arranged. For instance, the whole of the painting inside the Parliament buildings now being done has been given to a contractor who is builder or carpenter, certainly not painter, and no tender was called for this. I think you will admit this is unfair to the master painters, who have naturally become so disgusted at the way Government work has been arranged of late years that they feel fair play has a very small chance in the game that is evidently being played. Take again the contract for the painting work outside the Houses of Parliament. This was put out for tender. Why? Possibly the publicity of the work being observable to every passer by may account for the departure from the custom of late of encouraging private contracts. But no matter; what I wish to say is that the lowest tenderer for this work, I am quite certain, was not an experienced painter, and as the work was described to be done by painters surely one of the recognised firms should have got the contract. What would you say if a draper, who knew nothing about newspaper work, got the Government contract for printing? Yet this is equivalent to what

And for a further plea the defendant said that the letter was written after he had seen the manner in which the work was being executed, that the statements therein were justified by the manner in which the said work was executed, and were substantially true and correct, and published in the public interest without malice or intent to injure the plaintiff.

Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., and Mr. Watermeyer appeared for the plaintiff.

Mr. Sheil for the defendant.

James Proctor, plaintiff, on being sworn, said: I live at Observatory-road, and have carried on business during the last five years as a painter in Cape Town. Before coming to the Colony I was in business for fourteen years at Peterhead, where I served my full apprenticeship to a good man. I have some large contracts on hand at present, including the St. George's Home and the Look Hospital. In January, 1894, the Public Works Department called for tenders for painting externally the Houses of Parliament. I sent in a tender, which was accepted. I began the work on the 19th January, finishing on the 7th May. Mr. Cairncross (the Clerk of Works) and Mr. Kellaway (the caretaker), who is a practical painter, superintended the work, and found no fault with it. On the 27th April a letter appeared in the "Cape Times," attacking the manner in which the work had been carried out. As soon as I read the letter I went to my attorneys. My attention was called to the letter by several people, and I felt very indignant in consequence. My object in the present action is not to get damages, but to vindicate my character as a tradesman. I would have accepted an apology or retraction had it been offered. I have known Mr. Christ by sight for the last five years, but have had no personal dealings with him.

Cross-examined by Mr. Sheil: I had no means of knowing who the other tenderers were, and I am unaware of any public notification of the fact that I had been given the contract. I carried out the specifications to the letter with regard to the windows, which were cleaned with caustic soda and water before the oil was put on. I have never particularly noticed the brass handles of the sashes, and I could not say whether they were oiled or not. There was nothing said in the specifications about brass work. The specifications required that the glass work should be left perfectly clean, and I did so. I did not consider that this was a case for the Magistrate's Court, because my reputation as a tradesman was at stake. Everybody in the building trade knew that I was the tenderer referred to in the letter. I only knew Mr. Christ casually, and never had any misunderstanding with him. I cannot say that not one in every 10,000 of the public would know that I was the person referred to in the letter written by the defendant. I have lost no contracts in consequence of the letter. I preferred to bring the action in the Supreme Court rather than in the Magistrate's Court as greater publicity would be given to the proceedings, and I was anxious to vindicate my character as publicly as possible.

Re-examined by Mr. Innes: Men in the building and painting trade knew that I was the person referred to in the letter.

Mr. William Cairncross (Clerk of Works) said that it was his duty to supervise the plaintiff's work, which he visited nearly every day—sometimes twice a day. The work, in his opinion, was well done, and not merely up to contract. He gave a certificate to the effect that the work had been carried out in a good and workmanlike manner.

Cross-examined: Witness had not examined the sashes, and would not be prepared to say whether or not there was oil still dripping off them. It was no part of the contractor's duty to clean these sashes, as there were men specially employed to look after the brasswork.

---

has taken place, and has been the custom for some time. A great deal of public work in the painting line has been done without contract, and it is a significant fact that most of it is done by one firm who are no painters at all, but builders and carpenters, and sometimes men knowing as much of painters' trade as a shoemaker of architecture. The Government may, when they think fit, advertise, but great elasticity is generally exercised with the condition, "the lowest or any tender not necessarily accepted." I, with other master painters, look upon it as a real scandal that Government work should be manipulated as it is at present, and I hope things will mend soon, otherwise an inquiry will certainly be necessary as to whether the way in which the work done is sufficient value for the money paid. It is not encouraging the genuine tradesman as far as this work is concerned. I know of thirty or forty real workmen who waited on the chief firms for nearly a month to get work, believing that this contract would be given to one of these firms, and to a real master painter. They have, however, met with surprise and disappointment. The whole matter of letting out these contracts, and the entrusting of work to inexperienced men without tenders, wants looking into, and it will please me and other people who can legitimately tender to have some information which will clear the mystery at present surrounding the subject I have ventured to write to you about.—I am, &c.,

TENDERER FOR PAINTING.

He minutely examined the windows at the time the work was completed, and saw no traces of oil on the window-glass. Mr. Kellaway, caretaker of the House, was an experienced painter and plumber.

By the Court: Witness had been engaged in the Public Works Department for twenty-one years; for fourteen years as Clerk of Works.

Mr. Edmund Kellaway, caretaker of the Houses of Parliament, said that he was a three-branch hand—painter, plumber, and gasfitter. He came out to the Colony under Messrs. Bull, and took charge of these three branches during the building of the Houses of Parliament. He was requested in the present instance to supervise the plaintiff's work, which he did. He gave a certificate to the effect that the work was carried out in a thoroughly practical and workmanlike manner.

Cross-examined: It might be the case that there was still linseed oil on the handles of the sashes, but he had noticed none. He had no previous knowledge of the contractor. On reading the letter in the "Cape Times" he did not at the time know to whom it referred, as there were several other painters at work in the House.

Mr. Robert Mitchell, of the firm of Mitchell & Mackie, builders, of Cape Town, deposed that he had known the plaintiff since his youth. They were apprenticed in the same town. Plaintiff was well known in the building trade, and had done the greater part of the work for witness's firm, always giving satisfaction. He could not fairly be called an inexperienced painter. When he read the letter in the "Cape Times" he knew at once to whom it referred, and thinking it a serious matter and calculated to do plaintiff injury, he went to see him about it. The letter would not affect those who knew Mr. Proctor, but it might make others doubtful about giving him work.

Cross-examined: Witness was not aware that his partner had signed on behalf of the firm, making them sureties for properly carrying on the work.

Mr. George Scott, of the firm of W. and G. Scott, builders and contractors, stated that plaintiff had done work for his firm. He considered him to be a master painter. On seeing the letter in the "Cape Times" he wrote a reply, which, however, as legal proceedings were pending, the paper did not print, He considered that such a letter was calculated to do plaintiff injury.

Cross-examined: He knew that Mr. Proctor had the contract, because he saw his men at work in the Houses of Parliament.

This concluded the case for the plaintiff.

Mr. John Christ, the defendant, was then called, and said that he had had twenty-five years' experience as a master painter. When he wrote the letter to the "Cape Times," he was not aware who was the successful tenderer for the work at the Houses of Parliament, and he only knew that it was Mr. Proctor after receiving the lawyer's letter of demand. His reason for assuming that the work was not being carried out by an experienced painter was that when he was passing by the Houses of Parliament he saw Mr. Kellaway take the brush out of a workman's hands, and show him how to do the work. He came to the conclusion therefore that Mr. Kellaway had the contract, and knowing that he was the caretaker of the House, he thought that such a system was wrong. Witness had examined the works, and in his opinion, as a master painter, it could not be called a finished job. He noticed that all the ornamental work on the gates and railings was smeared with paint, which was still wet. He did not consider that the teakwork of the windows had been properly cleaned. He had no personal feeling against the plaintiff, with whom he had had no business relations of any kind. Had he known that the plaintiff had the contract he should not have written the letter. For all he knew, plaintiff might be one of the best painters in the world. He noticed only yesterday that the sash handles were still covered with oil, and that the glass was not free from traces of raw linseed oil.

Cross-examined: Witness's tender was £316. He would not pass the work as being a first-class job. Messrs. Kellaway and Cairncross could not, in his opinion, have examined the work properly. Supposing he was a master painter, and someone said he was not, he should consider it a rather serious matter, but he should not go to law about the matter. After he found out that Mr. Proctor was the contractor he did not apologise, because he still believed that the work had not been properly done.

Mr. Richard Goskar, master painter, of Mount-street, said he was not one of the tenderers for the work in question. He had inspected the work, and, taken as a whole, he did not consider it a first-class finished job. He noticed that on the windows the oil was allowed to drip and coagulate, there was a superfluity of paint on the railings, and the sash-handles were not clean.

Mr. Rose-Innes, Q.C.: The words used are clearly actionable, as they injure the reputation of the plaintiff as a good tradesman, and infer that he is not a master painter, and that he is incompetent to do the work. The plaintiff must have a remedy (see *Stewart's Case*).

Again, the defendant did nothing to repair the wrong. When he received the letter of demand, instead of offering an apology and explaining that he did not know who the successful tenderer was when he wrote the letter, he simply replied denying liability.

The plaintiff is entitled to some damages.

Mr. Sheil for the defendant: The Court has to decide two questions: (1) Is the letter libellous at all, and if it is (2) has the defendant established his pleas of truth and public interest?

No one reading the letter in its entirety can say that it is libel on the plaintiff. The defendant's object was to call attention to what he regarded as an abuse in the giving out of Government contracts to men who were practically incompetent to carry them out.

The letter was an attack upon the Government, and had nothing whatever to do with the plaintiff directly.

It is clear from the evidence that the defendant was not actuated by malice, inasmuch as he was unaware when the letter was written that the plainfiff was the successful tenderer. *Stewart's Case* has no application, as in that case the defendant specially mentioned Stewart's name.

There is some evidence that the work was not well done, and if the Court finds that as a fact then public interest follows as a necessary consequence.

If, however, the Court should hold that the plea of truth and public interest has failed, and that the words complained of amount to a libel, then merely nominal damages should be given, and Magistrate's Court costs, as the plaintiff might very well have vindicated his character in one of the lower Courts.

Mr. Rose-Innes, Q.C., in reply.

Judgment was given for the plaintiff for 1s. damages, with Magistrate's Court costs.

The Acting Chief Justice said: In this case the plaintiff claims £500 damages for a libel alleged to be contained in a letter written by the defendant to the "Cape Times" newspaper. The letter is headed "A Trade Grievance," and discusses the manner in which Government work is given out. It alleges that in some cases this has been done without inviting public tenders, and it refers in particular to the inside painting work at the Houses of Parliament. The letter says: "Take, again, the contract for the painting work outside the Houses of Parliament. This was put out for tender." The writer, however, continues, "But no matter; what I wish to say is that the lowest tenderer for this work, I am quite certain, was not an experienced painter, and as the work was described to be done by painters, surely one of the recognised firms should have got the contract." As a matter of fact, the plaintiff in this case is proved to be an experienced painter, and now that the defendant knows who the successful tenderer is, he says he would recognise him as one of the recognised firms who should have had the contract. Defendant says, "When I wrote the letter I had not the plaintiff in my eye. I did not know he was the successful tenderer. I thought a little job was being perpetrated by some of the Government officials, consequently I wrote the letter." That, however, is no answer to this action, if the letter was such as to indicate to the public that the plaintiff is the man aimed at. This defence is also weakened by the fact that when the defendant knew who the successful tenderer was, defendant again asserted that plaintiff was incompetent, and pleaded that the charge was true and well-founded. The difficulty which exists in my mind is as to whether this is not a fair comment upon a matter of public interest, and whether the defendant really goes beyond a mere expression of opinion in saying what is said in the letter. If the letter had said, "In my opinion the contractor is not an experienced painter," I think it would not have been possible for the Court to have held that this was even technically a libel. However, defendant asserts as a fact that which was not a fact, and charges plaintiff with incompetence in his trade or calling, and on that ground there is a technical libel. Defendant goes on further to ask, "What would you say if a draper who knew nothing about newspaper work got the Government contract for printing?" thereby intimating that the plaintiff was so inexperienced a painter that he was totally unfit to do the work undertaken by him. As to the second part of the letter relied upon, I do not think that contains any libel at all. He says, "I know of thirty or forty real workmen who waited on the chief firms for nearly a month to get work, believing that this contract would be given to one of those firms and to a real master painter." What a real master painter would be in the opinion of one man would not be so in the opinion of another, and there would be no libel in this. The defendant was certainly very ill-advised when he got the attorney's letter not to say at once, "I did not know that you were the tenderer, because I do recognise you as one of the contractors who ought to have got the work." Instead of this he replied that he saw that the work not being properly done, and he justifies his letter now in his plea, which amounts to a repetition of the allegation

that the plaintiff is not an experienced painter, and that he was incompetent to do the work. Taking all the circumstances altogether, and applying to them the legal principles which have reference to such a case, I must hold that a libel has been technically made out. This letter is something more than a mere expression of opinion; it amounts to an attack on the business capacity of the plaintiff. However, no damage has been suffered by the plaintiff, and I think under the circumstances he might very well have allowed this letter to pass without any notice whatever. Under the circumstances, I think the justice of the case will be met by giving merely nominal damages of 1s., and Magistrate's Court costs.

Mr. Justice Barry: I am also of opinion that there should be judgment for the plaintiff. The charge in this case appears to be this, that the tenderer under this contract is held forth to the public as not an experienced painter, and as being as unfit to undertake a contract for painting as a draper who knew nothing about newspaper work would be to undertake a printing contract. I have no doubt, after the evidence we have heard, that the defendant at the time he wrote the letter had Kellaway in view; but that does not end the matter. If in trying to hit Kellaway the defendant hit another man (the plaintiff), which he undoubtedly did in this case, the plaintiff was justified in coming into court and suing the defendant on the ground that the words used tended directly to injure his character as a tradesman. One could have quite understood if the plaintiff had passed the matter over, but it is not surprising that he wrote the letter which he did claiming damages. When the defendant received that letter, one would have certainly supposed that if he had Kellaway in view he would have frankly said so, and then have rectified his blunder, which was of a somewhat malicious character, but instead of that, he says, "I mean now to assert that what I asserted in the paper applies to you," and that is his whole answer. Not until he comes into court does he disclose the fact that in writing this letter he had Kellaway in view. Under these circumstances I think the plaintiff was justified in coming into this Court, and further, if I were sitting alone I should have said, although the plaintiff might live this down, as many another man has lived down nasty things said about him, still the law will aid him. And inasmuch as what we have heard in court shows that this is a case on the very border line which divides libellous allegations from criticism, it shows that this is a case which has been properly brought before this Court, where judges, instead of a magistrate, can determine it. Because I venture to think that possibly if this case had been brought into a Magistrate's Court, and the Magistrate had come to a certain decision, there would have been perhaps an appeal, especially if he had been supposed to err on a question of law. I think, therefore, this is not an improper case to be brought into this Court, if it could be brought with success in any Court. It has been brought with success in this Court, and therefore, had I been sitting alone, I should have given the plaintiff such damages as would carry costs—viz., 40s.

Mr. Justice Upington: I fully concur with the Acting Chief Justice. I think this is a trumpery case from beginning to end.

The Acting Chief Justice: I wish it to be clearly understood that we all accept, as conclusive, Mr. Cairncross's certificate that this work was properly done. We add that for the benefit of the plaintiff.

Mr. Justice Upington: I also think the work was properly done, and if the defendant had not made the fatal error of pleading justification, I would have had difficulty in arriving at the conclusion that there was any libel at all.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

AUSTIN V. RAPHAEL. } 1894. August 24th.

This was an action for the restoration of two bracelets or their value, £50, instituted by Austin Frederick Austin against Albert Philip Raphael.

The declaration alleged that on 19th March, 1894, the plaintiff pledged with the defendant two bracelets of the value of £50 for a loan of £10.

That thereafter, on the 14th May, the plaintiff tendered the said sum of £10 with interest to the defendant to redeem the bracelets, but the defendant refused, and still refuses, to restore the bracelets to the plaintiff or to pay him their value, £50.

The plaintiff prayed for:

(*a*) An order compelling the defendant to restore the bracelets, or to pay their value, £50.

(*b*) Alternative relief, with costs.

The defendant in his plea denied that the bracelets had been pledged, and alleged that they were sold to him for £10.

He further said that on 15th May the plaintiff offered to re-purchase the bracelets for £11, but that the bracelets had been already sold by him, the defendant, prior to that date to one Jacobs, and that he informed the plaintiff thereof,

He admitted that he refused to restore the bracelets to the plaintiff, or to pay him any sum of money, and he specially denied that the value of the bracelets was £50, and he prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Graham and Mr. McLachlan for plaintiff, Mr. Rose-Innes, Q.C., and Mr. Watermeyer for defendant.

Plaintiff, on being sworn, said that he resided in Cape Town. He knew the defendant Raphael, and on the 19th March went to his shop in Grave-street. He had heard that he was a money-lender, and wished to borrow some money. Mr. Lyons was present. He said to defendant, "You are Mr. Raphael I believe, and you lend money on jewellery." Defendant replied, "I do, but I never lend less than £10, on which I change a sovereign interest per month." Witness observed, "That happens to be exactly the amount I require." Defendant rejoined, "Very well then. Let me have a look at your security." Witness then produced from his pocket two diamond bracelets—one all diamonds, the other diamonds and sapphires—and after glancing at them, the defendant led the way into his little office where he produced from a wallet, taken from his breast pocket, two five-pound notes. He then took out of rack lying on his desk what appeared to be an ordinary bill-head, and asked him to write his name upon it, in order that he might know him again. He wrote his name across the paper. At that time there was no other writing on it whatever; merely the printed headline. Witness requested the defendant to take particular care of the bracelets, as they were the property of his wife, and he did not want to lose them. Defendant replied, "They will be as safe with me as if they were in the Bank of England." Witness further explained that he was off to Oudtshoorn that night, and the jewellery might be redeemed in a few weeks or perhaps in a few months, he could not say which. He also added that he might send the money to his wife, and defendant promised that the jewellery should be restored to her at any time on repayment of the loan, provided she produced a line from her husband. He left for Oudtshoorn that night, and at Prince Albert-road on the following Wednesday met a gentleman named Frank Bradley, an owner of racehorses. About three weeks later he returned, and on the 15th May called to see Raphael, in company with a man named Morley, who was staying with him at his house. He said, "I have come for those bracelets." Defendant said, "I will go and get them," and went round the corner towards Grave-street. He returned in four or five minutes alone, and said he could not find the man's address. It was a man named Jacobs, he added, who had got the bracelets. Defendant added, "Come back and see me in about an hour's time." Witness returned at the appointed time, still accompanied by Mr. Morley. Defendant said, "I have sold those things of yours, but don't be frightened; the man is a friend of mine. Witness looked at him with astonishment, and asked him what he meant. Defendant added, "Don't be alarmed you'll get them right enough. They will be here by twelve o'clock, and I will have them for you." On the stroke of twelve o'clock he and Morley returned. Defendant said, "Wait a moment and I will go and bring the man." He went away and returned with Mr. Jacobs in a cab. Raphael said "This is the young fellow that owns these bracelets." Jacobs replied, "I have sold them," adding the further explanation, on being questioned, that they were disposed of on the Kenilworth Racecourse the previous day. The purchaser, whose name he did know, lived at Claremont, and he would be able to get them back. The price realised was £14 10s Witness told Raphael that what Jacobs had done was nothing to do with him, as his business was with the plaintiff. He further said, "I can see what this is, you are trying to do me out of the bracelets between you." Jacobs, professing to be insulted. hereupon went away. Witness then counted out £12 and insisted on the return of the bracelets. Raphael said it would be all right, but that perhaps Jacobs was trying to get a pound or two more out of him. Witness then threatened to resort to other means if the bracelets were not restored. Raphael put his back to the walls, stuck his hands in his pocket, and hanging down his head, said he could do what he liked. He then went round to the office of Mr. W. B. Shaw, and left the matter in his hands. Witness identified the signature on the document produced, "A. F. Austin." as being in his own handwriting, but he was quite sure that when he signed it there was no writing upon it. The bracelets in question were bought in Melbourne three years ago for £50. Mr. Ansell, a leading jeweller of Johannesburg, offered him £40 for them whenever he wanted to sell them, and advanced him £25 upon them as a loan. There was no stone missing from the bracelets at the time he handed them to Raphael.

Cross-examined: Witness landed in the Colony two years ago from England. He had formerly lived in Australia. He was now living in a well-furnished house in the Gardens. He did a little bookmaking, but could not be called one of the leading bookmakers. He never kept

a faro bank over the Union Bank in St. George's-street, but had visited a cigar shop in Grave-street and played cards there. He had never played cards at his own house for gambling. He could fix the date of the 19th March, because it was two days before his wife's birthday, and she did not want him to go away. He went to Oudtshoorn to attend the race meeting. The best bracelet being all diamonds was worth £27 10s., the other one with the sapphires was worth £22 10s. On the occasion of his visit to the defendant the latter did not say that he did not advance money and refer him to a pawnbroker. He did not think there was anything curious about the defendant asking him to sign his name on a blank piece of paper. He asked defendant for a receipt, but he said that none was necessary, and he would find him as straight as a die. Nothing was said about a stamp being put on afterwards, and if the receipt had been put before him to sign he would no more have thought of signing it than he would of throwing himself into the water. Nor did the defendant say that he should have the bracelets back if he had them still. Witness employed himself at Oudtshoorn in making a book. He had about £25 capital in all,

Louis Lyons said he had a casual acquaintance with the plaintiff. He also knew Raphael. As far as what took place in the latter's shop in his presence on the occasion in question, he was able to confirm the plaintiff's evidence. He was quite clear that the paper which plaintiff signed was unstamped, and he saw defendant write nothing upon it.

Victor Morley gave corroborative evidence as to what took place in his presence between the two parties on the 15th May.

Cross-examined: Witness was a professional vocalist, and also did a little in light comedy, but he was not a bookmaker as well.

Millicent Austin, wife of the plaintiff, proved that both bracelets were perfectly sound when she handed them to her husband in order that he might raise money upon them.

Harry Bradley, an owner of racehorses, said that he met plaintiff seven or eight years ago in New Zealand. He remembered meeting him at Prince Albert-road on the 20th March.

The Court at this stage adjourned till Monday, the 27th August, and on the case being then called his counsel stated that the defendant consented to judgment against him in terms of the prayers of the declaration.

[Plaintiff's Attorney, Gus Trollip; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

ROSSOUW'S EXECUTOR DATIVE AND HEIRS V. ROSSOUW'S EXECUTOR TESTAMENTARY. } 1894. August 27th.

On 14th April last, the heirs of the late Daniel Jacobus Rossouw applied for an order restraining the respondent, the executor testamentary of Mrs. Rossouw and the defendant in the present action, from selling the farms De Plaat and Schalkwyk's Kraal, situate in the division of Sutherland, pending proceedings to be taken by the heirs.

The Court by consent then made the following order: It is ordered that respondent be authorised to sell the farms De Plaat and Schalkwyk's Kraal, situated in Klein Roggeveld, division of Sutherland, by public auction, after due notice, on condition that the proceeds of the sales be retained by him pending the further order of the Court, the costs of this application to be paid out of such proceeds. This order not to prejudice any rights of the applicant in respect of his fees as executor. Application to stand for summons.

When this order was made the first-named plaintiff was not formally before the Court; subsequently, however, his power was filed, but separate powers were not obtained from each of the heirs for the purposes of the present action, though they had been parties to the previous application, and the Registrar of the Court refused in consequence to set the case down for trial unless directed by the Court.

Mr. Schreiner, Q.C., now brought the Registrar's objection to the notice of the Court.

The Court directed the case to be set down for trial.

JURGENSEN V. KUNJAN. } 1894. August 27th.

Magistrate's jurisdiction — Counter claim— *Bona fides.*

J. *sued* K. *in the Magistrate's Court at Kimberley for delivery of possession of certain premises situated at Wesselton, and belonging to the De Beers Consolidated Mines (Limited), the lease of which he had bought from one* D. *on the 15th August, 1892. In the preceding month of July one* R., D.'s *father, purported to sell the same premises to*

K.. *who paid* R. *the purchase price, entered into possession, and greatly improved the property.*

In the suit between J. *and* K. *the latter excepted to the Magistrate's jurisdiction on the grounds* (1) *that the property in question was in dispute and* (2) *that the right of occupation was of the value of £40 and upwards to* K.

These exceptions having been overruled, K. *pleaded the general issue and claimed in reconvention £100 in respect of improvements.*

The Magistrate being satisfied as to the bona fides *of the claim in reconvention, dismissed the case for want of jurisdiction.*

On appeal, *the Magistrate's judgment was sustained.*

This was an appeal from a decision of the Resident Magistrate of Kimberley in an action in which the present appellant, plaintiff in the Court below, sued the respondent, defendant, for delivery of possession of certain premises situate at Wesselton, in the district of Kimberley, known as Stand No. 11, Block D, together with the buildings and erections thereon, of which, the summons alleged, the plaintiff is the present lessee, and the said defendant the occupier of the said stand and buildings under him the said plaintiff.

The defendant excepted to the jurisdiction on the grounds:

1. That the ownership of the property in question is in dispute.

2. That the right of occupation of the property in question is of the value of £40 and upwards to the defendant.

Evidence having been taken, the exceptions were overruled.

The defendant then pleaded the general issue and claimed in reconvention £100, being for compensation for the enhanced value of the improvements effected by defendant upon the said stand.

Evidence as to the *bona fides* of this claim having been taken, the Magistrate dismissed the case, holding he had no juridiction.

The following were his reasons:

I found as facts that Pakoo sold the stand through Ramprarada to defendant.

That for two years after purchase defendant lived upon the stand and duly paid the stand rent.

That during such time defendant built six rooms and otherwise enhanced the value of the property, for which he claims £100.

In my opinion defendant acted *bona fide*, and was entitled to compensation before being evicted from the stand, and that his claim for compensation (which I was satisfied was *bona fide*) was beyond my jurisdiction.

The plaintiff now appealed.

It appeared from the evidence that Kunjan bought the lease of the premises from one Ramprarada in July, 1892, for £30 13s. Ramprarada bought from one Pakoo on behalf of his son Desuram; the latter sold the premises to Jurgensen on 4th December, 1893.

There was no contract of any kind between the De Beers Consolidated Mines (Limited), the owners of the property, and Kunjan; but the latter after he bought from Ramprarada remained in possession, built six rooms, and otherwise improved the property.

The stand licence issued by De Beers was subject to the following conditions *inter alia:*

2. * * * *The usual thirty days' notice and compensation for immovable buildings being given according to valuation by two competent persons, one to be elected by either party.*

3. *The licence is not transferable without the consent of the proprietor in writing. A fee of* 10s. *being payable for such transfer.*

4. *The ground is not to be sublet in whole or part without the consent of the proprietor in writing.* * * * * *

* * * * * *

7. *The least to be renewable at the will of the tenant, provided all the terms and conditions above stated shall have been complied with.*

Mr. Rose-Innes, Q.C., in support of the appeal: The defendant had no claim for compensation against the plaintiff. He claimed as a lessee. The rights of a lessee are to recover compensation for improvements made with the landlord's consent. But as to improvements made without such consent his only course is to remove them. *De Beers C. M.* v. *L. and S. A. Ex. Co.* (3 Sheil at p. 444). There is no proof in the present case that the landlord consented, on the contrary De Beers never recognised the defendant, and consequently could not have consented.

If the defendant is not a lessee but a *bona-fide* possessor he may plead to remain in possession until he has been compensated, but he has not done so, or he can give up possession and then sue for compensation, but he has not given up possession, and his claim is bad in law,

He has no action against the plaintiff but only against the landlord, and therefore the claim being bad in law cannot be *bona fide*.

Mr. Schreiner, Q.C., for the respondent.

The Court dismissed the appeal.

The Acting Chief Justice, in delivering judgment, said: The plaintiff in the Court below, who is appellant to-day, claims to be the lessee under a written document from De Beers Company of the stand in question. He has not, however, so far as the records before us go, shown that he is such lessee in writing. He brought an action for ejectment against Kunjan, who is in possession. Kunjan objected to the jurisdiction of the Court—firstly, on the ground that the ownership of the property in question was in dispute. This the Magistrate overruled, because the ownership was, strictly speaking, neither with the plaintiff nor with the defendant but with the De Beers Company. Defendant then excepted on the ground that the right of occupation of the property was of the value of £40 and upwards. This exception the Magistrate also overruled, though so far as the records before us go there was ample evidence to sustain the objection. After these exceptions had been overruled defendant pleaded a claim in reconvention for compensation for the amount of £100. The Magistrate has found that this claim was made *bona fide*, and the amount being beyond his jurisdiction, he was bound to dismiss the case. It is admitted that if this claim is *bona fide* and can be sustained at all, it was beyond the Magistrate's jurisdiction. and the Magistrate was right in his decision. I am not prepared to say that this claim is not *bona fide*. This is not a question between the owners of the property and the lessee, but between two persons, to whom a right has been given by the same person. The defendant had certainly the first agreement with Ramprarada, through whom the plaintiff also claims to have acquired his right. This is not a question which the Magistrate can well settle. If the amount in dispute is beyond his jurisdiction, the Magistrate was quite right in dismissing the case and saying that he had no jurisdiction. There are several other exceptions which have presented themselves during the hearing of the argument which I think would render it perfectly futile to send this case back to the Magistrate. There are several legal grounds which might be raised during the hearing of the case, and if the defendant was unable to sustain his claim for compensation there are several other claims in the case which would serve to oust the Magistrate's jurisdiction. I therefore think the appeal should be dismissed with costs,

Mr. Justice Barry: I concur. The essential condition in this case is that the plaintiff should prove that he is the lessee in writing. It is true that the objection was not taken in the Court below, but it appears on the face of the evidence, therefore, if we sent the case back to the Magistrate this point would be taken, and defendant would claim absolution from the instance. I do not know under those circumstances that the Magistrate would not be forced to dismiss the case, and therefore it is better to prevent further litigation between the parties, inasmuch as it would ultimately result in disaster to the very man who now wishes to perpetuate it. There are other reasons which have some force, but this is perhaps the most forcible I would advance for refusing to send this case back to the Magistrate.

Mr. Justice Upington concurred.

[Appellant's Attorney, A. McLeod; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

PARTRIDGE V. BLAKE. { 1894. August 27th.

Plea in abatement—Summons—Costs.

P. *sued* B. *for balance of account. The summons was issued on 5th September, 1892, but no further proceedings were taken.*

Subsequently P. *instructed other attorneys, and a second summons was issued on the 15th December, 1893.*

On the 5th April, 1894, the first summons was withdrawn and on the 23rd May, 1894, the costs of the first summons were paid by P.

On the 28th May, 1894, B. *filed a plea in abatement and prayed that* P.'s *declaration and summons might be quashed.*

The Court *overruled the plea in abatement with costs, but gave* B. *leave to plead within three days.*

This was an action for £91 0s. 9d., balance of account, and £35 damages, instituted by Richard Johnson Partridge against Siegfried Walter Blake.

The declaration alleged that the plaintiff is an insurance agent residing in Cape Town, and the defendant is, or was formerly, a travelling agent for the Equitable of New York Life Insurance Company, and resides in Cape Town.

On or about the 29th day of February, 1892, the plaintiff and defendant entered into a special agreement, whereby in consideration of the plaintiff's introducing and effecting insurances with the defendant the said defendant agreed to pay the said plaintiff a salary of £10

per month and expenses not to exceed £20 per month, in addition to a commission of 5 per cent. on the insurances effected through his means, as will more fully appear from the terms of the agreement annexed hereto, which the plaintiff prays may be considered as incorporated herein.

Subsequent thereto the salary of the plaintiff was increased by the defendant from £10 to £15 per month, the other conditions as to expenses and commission remaining as before, such increase to reckon and to be payable from the 1st April, 1892.

Under and by virtue of such agreements, the plaintiff entered into the service of the said defendant at the time agreed upon, and performed his duties to the best of his abilities until at or about the beginning of September, 1892, when the defendant, without notice, or reasonable or just cause, discharged him from his employ.

At the date of such discharge, there was due and owing by the said defendant to the said plaintiff the sum of £91 0s. 9d., for balance due for his salary and expenses and commission, as will more fully appear from the account hereunto annexed, which the plaintiff prays may be considered as inserted herein.

Wherefore the plaintiff claims:

(*a*) Judgment for the sum of £91 0s. 9d., being the amount due to him on balance of account.

(*b*) Judgment, in addition, for the sum of £35, for damages for wrongful and unlawful dismissal.

(*c*) Alternative relief.

(*d*) Costs of suit.

The defendant pleaded as follows: That the plaintiff should not be permitted to have and maintain the present action, for whereas the present summons in the present action was issued from this Honourable Court on or about 15th December, 1893, that heretofore, to wit on or about 5th September, 1892, the present plaintiff issued summons, copy of which is hereunto annexed, and which the defendant prays may be considered as herein inserted, in respect of the same cause of action; that thereafter on or about 8th September, 1892, the present defendant entered appearance to the said summons, that the said proceedings have not been withdrawn by the plaintiff, that notwithstanding the premises and that the defendant's costs in the aforesaid action had not been paid, the plaintiff wrongfully and unlawfully issued summons for the same cause of action, likewise declaration against the defendant.

Wherefore the defendant prays that the summons and declaration in the present action may be quashed, with costs.

The plaintiff in his replication admitted that he issued summons on September 5th, 1892, against the defendant, and that the latter entered appearance.

He admitted that thereafter, through other attorneys, he issued summons in the present case on December 15, 1893, and that the said summons was in the same cause of action, but he said that the first summons was withdrawn on April 5, 1894, and that thereafter on May 23, 1894, the defendant's costs in respect of the said summons were paid by him to the defendant. (The plaintiff craved leave to refer to the taxed bill of costs.)

Save as above, he denied the allegations in the plea, and prayed for judgment with costs.

Mr. Molteno was heard in support of the plea and cited *Simpson* v. *Fick* (2 M., 269); *Van der Linden*, p. 275; *Voet* (44, 2, 7); *Chitty on Pleadings*, Vol. 1, 469); *S.W.D.M. Co.* v. *Hall* (1 A. C., 221).

Mr. Graham, for the plaintiff, relied on *Laubscher* v. *Vigors & Frier* (Buch., 1873, p. 20).

The Court overruled the exception with costs.

The Acting Chief Justice said: To the declaration of the plaintiff in this case the defendant has pleaded what is known to our law as an exception, but which is really a plea in abatement. Some exceptions are what are called dilatory, or pleas in abatement; and others are perpetual, or pleas in bar. Among the dilatory exceptions or pleas in abatement is the plea of *lis pendens*, being a dilatory exception not absolutely barring but only postponing the right of action. Acting under this principle, this Court in the previous case of *Laubscher* v. *Vigors & Frier* (Buch. 1873, p. 20) would not allow the plaintiff to proceed with the second action until the record had been purged of the first suit. But as soon as the record had been purged of the first suit, and the dilatory exception had been removed, then the Court allowed the parties to go on with the case. The law is distinctly laid down in that case—which I know from being engaged in it myself, was quite as warmly contested then as the matter is on behalf of the defendant to-day. In this case the plaintiff had taken out a previous summons. Notwithstanding that this summons was still on the record, he took out a second summons and filed a declaration, but before the defendant had pleaded to this declaration he had withdrawn the previous summons, and asked defendant for his bill of costs, which defendant had made out, and which was paid to him by plaintiff. We have in this case the fact that the cause has been withdrawn and costs paid and notice given to the defendant

before the defendant was called upon to plead. Notwithstanding all this, defendant pleads *lis pendens*. Seeing that the record had been purged of the previous suit, and that defendant had notice that the action had been withdrawn and he had received his costs, I do not think this plea ought ever to have been put on record. The exception will be overruled, with costs (the costs of the argument), and defendant be given leave to plead within three days.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Du Preez & Walker; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

STENT V. WILLIAMS, N.O. { 1894. August 27th.

Exception—Plea—Negligence in preparing plans—Damages.

S., *an architect, sued* W. *in her capacity as Sister Superior of St. George's Home, Cape Town, for the sum of £171 16s. 2d., balance of commission due for professional services rendered in connection with the designing and carrying out of plans for the erection of certain buildings for* W.

W. *in her plea alleged that owing to the negligence of* S. *in preparing his plans additional expenditure amounting to £500 was necessary in order that the contract might be completed, and that* S. *was liable to* W. *for the increased expenditure.* W. *also alleged that owing to improper instructions given by* S. *a further expenditure of £150 would have to be incurred, and she claimed in reconvention £650, less the amount of* S.'s *commission.*

There was no allegation in the plea that W. *had become liable for the £650 or that she had sustained damages in that amount.*

S. *excepted to the plea as being bad in law and that it afforded no defence to* S.'s *claim, inasmuch as there was no allegation in the plea that* W. *had suffered any damage, or had paid or was liable to pay any sum of money by reason of* S.'s *alleged wrongful acts.*

Held, *that the plea was bad, but leave was given to amend by inserting an allegation of damages.*

This case came on for argument on an exception to the defendant's plea.

The action is for the recovery of the sum of £171 16s. 2d., being the balance of commission for professional services rendered by Mr. Sydney Stent, architect, to the defendant in her capacity as Sister Superior, for the time being, of St. George's Home, Cape Town.

The defendant in her plea alleged that the plaintiff prepared the plans, sections, and drawings in connection with the work (the rebuilding of St. George's Home) in so negligent, improper, and incomplete a manner that a large amount of additional expenditure upon the said work is necessary in order that the contract for the erection of the buildings may be completed, the levels as shown according to the said plans, sections, and drawings were erroneous, and expenditure to the amount of £500 is necessary in and about the work of excavation and other similar work, in consequence of the above defects in the said plans, sections, and drawings, all of which have been pointed out to the plaintiff, the plaintiff is liable to pay to the defendant the said sum of £500.

To this plea the plaintiff filed the following exception:

The plaintiff excepts to the plea of the defendant as being bad in law and affording no defence to the plaintiff's claim, inasmuch as there is no allegation in the said plea that the defendant has suffered any damages, or has paid, or is liable to pay, any sum of money by reason of the alleged wrongful acts of the said plaintiff.

Wherefore he prays for judgment with costs.

Mr. Graham was heard in support of the exception.

Mr. Sheil, with him Mr. Webber, for the defendant.

The Court held the plea bad, but gave the defendant leave to amend by alleging damage in the claim in reconvention.

Costs to be costs in the cause.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Messrs. Sauer & Standen.]

COLONIAL GOVERNMENT V. HEPWORTH AND SON, LIMITED. { 1894. Aug. 28th. Sept. 4th.

Joint-stock Company—Licence—Act 3 of 1864, schedule 17—Act 20 of 1884.

The 17th schedule to Act 3 of 1864, as amended by Act 20 of 1884, provides that: Every joint-stock company carrying on business in this colony shall annually take out a licence, for which there shall be payable for every £100 of the subscribed capital of such company 1s,

The term joint-stock company shall, for the purpose of the above licence, embrace :

(*b*) Every such company of which the chief seat or principal place where its business is managed shall not be within this colony, but of which any of the dealings shall, by the deed or other instrument regulating such company, be described as to be carried on in this colony.

The memorandum of association of the H. Co., *whose principal place of business is in London, and which has been established in Cape Town since May, 1893, provides that one of the objects of the* Co. *is to carry on* "in any part of the world" *the business of wholesale and retail clothiers and outfitters.*

Held, *in an action instituted by the Colonial Government, that the* Co. *was liable to pay an annual licence of 1s. on every £100 of its subscribed capital, the language employed in the memorandum of association,* "in any part of the world," *being sufficient to include Cape Colony in terms of section 1, sub-section (b) of the schedule.*

Colonial Government v. British South Africa Company (9 Juta, 280; 2 Sheil, 216) *distinguished.*

This was a special case, stated for the determination of the Court in the following terms:

1. The plaintiff is the Assistant Treasurer of the Colony and Receiver-General of Revenue, and as such is entitled to sue in the present action. The defendant is the agent in Cape Town of J. Hepworth & Son (Limited), a joint-stock company which, as through the agency of the defendant, carried on business as wholesale and retail clothiers and outfitters there continuously since May, 1893, and is the proper person to be sued in the present action.

2. The capital of the said company is £360,000, divided into 10,000 preference shares of £10 each and £260,000 ordinary shares of £10 each. The head office, which is the principal place where the company's business is managed, is in London, but the company has established agencies for the transaction of business in this colony, and in various other parts of the world.

3. According to the memorandum of association of the said company, which bears date the 10th day of November, 1891, one of the objects for which the company was, and is, established is "to carry on in any part of the world the business of wholesale and retail clothiers and general outfitters." In no other part of the memorandum, and in no other deed or instrument regulating the company, is any reference, save as aforementioned, made to any special locality where the dealings of the company are to be carried on.

4. By schedule 17 of Act No. 3 of 1864, as amended by Act No. 20 of 1884, it is provided that every joint-stock company carrying on business in this colony shall annually take out a licence for which there shall be payable for every £100 of the subscribed capital of such company the sum of 1s., and the term joint-stock company is defined by sub-section 6 of section 1 of the said schedule to embrace every company having a capital stock divided into shares, of which company the chief seat or principal place where its business is managed shall not be within this colony, but of which any of the dealings shall, by the deed or other instrument regulating such company, be described as to be carried on in this colony, and by section 2 of tariff 15 of schedule 2 of the said last-mentioned Act, it is declared that when any annual licence shall be issued upon or after the 1st of July, there shall be payable one-half of the appointed sum. If taken out at any time before the 1st of July, there shall be no deduction.

The plaintiff contends that the said joint-stock company is liable, under tariff 17 of Act No. 3 of 1864, as amended by Act No. 20 of 1884, for the sum of £360, being two years' licence money. The defendant contends that the company is not liable under the said tariff as contended by the plaintiff.

Wherefore the parties pray for the judgment of this Honourable Court upon their respective contentions, and upon the question of the costs of this case.

The Attorney-General and Mr. Giddy for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Tredgold for the defendants.

Cur. ad vult.

Postea (September 4),—

The Court delivered judgment.

The Acting Chief Justice said: The question for decision is, whether the defendant company is such a joint-stock company as is liable to stamp duty under the 17th schedule to Act No. 3, 1864, as amended by Act No. 20, 1884. The part of the schedule upon which the plaintiff's claim is founded is sub-section (*b*) of section 1, and is as follows: "(*b*) Every such company of which the chief seat or principal place where its business is managed shall not be within this colony, but of which any of the dealings shall, by the deed or other instrument regulating such company, be described as to be carried on in this colony." Prior to 1884 the

licence of such foreign companies was reckoned upon one-half, instead upon the whole, of its subscribed capital; but by Act No. 20, 1884, which had for its declared object the increase of the revenue, this limitation was repealed, and the section amended as above cited. It is common cause that the defendant company is a joint-stock company, with its head office or principal place where its business is managed in London; and that by its memorandum of association one of the objects for which the company was established is to carry on "in any part of the world" the business of wholesale and retail clothiers and outfitters; and that the company has carried on business in Cape Town as such wholesale and retail clothiers continuously since May, 1893. The contention upon which the defendant bases his claim to be exempt from the payment of this license rests upon two grounds. First, that the company's memorandum does not describe this colony as a place where any of its dealings are to be carried on; and secondly, and consequently, that as this is not such a joint-stock company as comes under section 1 of the schedule, it is at most one doing business through the instrumentality of some agency in this colony, such as was contemplated by the 5th section of the schedule. This 5th section has since been repealed, so that if the company does not come under section 1 there can be no licence demanded from them. Though now repealed, this 5th section is useful in considering the true construction to be placed on the 1st section, and as showing the intention of the Legislature at the time the Act was passed. In the case of the *Colonial Government* v. *British South Africa Company* (9 Juta, 280) this Court found that the British South Africa Company would have been taxable under this 5th section, but not under the 1st section. But the reason of that decision is to be found in the following words of the judgment of the Chief Justice: "I have looked carefully through the charter and deed of settlement, and can find nothing in either which describes this colony as the place in which the business of the company is to be carried on. There can be no doubt that the company is allowed to establish an agency in this colony." If I am correct as to the *ratio decidendi* in that case, that is sufficient ground to distinguish it from the present one. The words in the special case that the defendant company carries on its business here through the agency of the defendant are not happily chosen for the plaintiff's view, but in fact, I do not think this can be held to be a case where the defendant company can be described "as doing business in this colony through the instrumentality of some agency in the Colony." True, the defendant is the agent of the company, but the company has its own place of business in this Colony, and directly enters into competition with traders here. But in either view we are driven back to the consideration of the sub-section (*b*) of the first clause of the schedule, for if this company comes under its provisions, the 5th section of the schedule does not apply. The issue narrows itself down to this. Can it be held that a deed of incorporation which authorises a joint-stock company to carry on business in any part of the world, be an instrument in which the business of the company is "described as to be carried on in this colony?" If it is, then the decision in the British South Africa Company's case does not apply here, and there can be no question of the applicability or otherwise of the 5th section of the schedule. Whether or not it is sound policy to place such a heavy tax upon joint-stock trading companies which is not borne by individuals, is not for us to consider. The tax imposed by this schedule is for the privilege of having the *persona* of the company recognised. As was said in the *Queen* v. *Pistorius* (5 Juta, 106), it is "for the privilege of carrying on business at all in the Colony—for without such a licence they could not carry on business at all." It does not relieve the company from any other licence which any person carrying on a similar business has to pay. I admit that the section must be strictly construed, but in my opinion it would be a straining of the rules of construction to say that the defendant company does not come within the section. The company is not acting beyond its memorandum of association in carrying on business in this colony. Having opened business here, we are, I think, bound to hold that the deed in authorising business to be carried on in any part of the world includes and describes this colony as a place in which such business is to be carried on. If that is correct, then the defendant company is liable to this tax, and judgment must be given in favour of the Government as prayed.

Mr. Justice Barry concurred in the following terms: The question for us to determine in this case is whether this business can be said to be dealings within the meaning of the Statute, and whether, if so, those dealings are carried on in this colony. Unaided and uninfluenced by authority, or by any words in the Statute itself other than those referred to, I should come to the conclusion that in describing the objects of the company to be "to carry on business in any part of the world," Cape Colony is included in the

definition, and that the defendant company would be liable to pay stamp duty for the privilege of trading here under its articles as a joint-stock company; and I do so because the greater is included in the less, and the words "any part of the world" include Cape Town quite as much as London. In this conclusion I am to a certain extent supported by the ruling of the Court in the case of the *Queen* v. *Pistorius*, where the Court held that the tax imposed by this statute is for the privilege of carrying on business at all in this colony. For, in the language of the Chief Justice, without such licence they could not carry on business at all. But a difficulty arises owing to the case of the *Colonial Government* v. *British South Africa Company*, where the defendant company, it is contended by Mr. Innes, carried on business in this colony through an agency, and was entitled to do so under its charter, which allowed it to establish and maintain agencies in the Colony and elsewhere. Whatever difficulties may arise in distinguishing that case from the present one—and I confess they are many—the reasons for that decision are stated in the words of the Chief Justice and for that reason are to be our guide. The Chief Justice said: "I carefully looked through the charter and the deed of settlement and can find nothing in either which describes this colony as the place in which the business of the company is to be carried on." If I look to the articles of the association in the present instance I am unable to say I can find nothing in them which describes this colony as the place in which the business of the company is to be carried on. On the contrary, in the words "in any part of the world" I find the description of Cape Colony as well as London, and I am therefore forced to the conclusion that the defendant company is liable to the tax in carrying on its business or dealings here as a joint-stock company.

Mr. Justice Upington: I am most reluctantly driven to the same conclusion. I think it is to be regretted that this case was not brought on at an earlier period, when the Parliament of this country might have had an opportunity of reconsidering this legislation, but I am bound by the Act of Parliament.

Judgment for plaintiff with costs.

[Attorneys for the Government, Messrs. J. & H. Reid & Nephew; Attorneys for the Company, Messrs. Fairbridge & Arderne.]

HORWITZ v. LLOYD. { 1894. August 28th.

Magistrate's jurisdiction—Appeal—Costs.

Where a Magistrate had given judgment for the amount of a claim in convention and dismissed a claim in reconvention, and on appeal from his judgment it appeared that an amount beyond his jurisdiction was in dispute,

The Court, although no exception had been taken to the jurisdiction of the Magistrate, altered the judgment to absolution from the instance both on the claim in convention and reconvention, but made no order as to costs.

This was an appeal from the decision of the Assistant Resident Magistrate of Prieska, in an action in which the present respondent, Dr. Lloyd, plaintiff in the Court below, sued the appellant (defendant), for the sum of £14 12s. 9d., being the balance due for medicines had and received by the defendant, and also for the sum of £32, as damages for breach of contract for non-delivery of a spring wagon.

The defendant excepted to the summons on the grounds:

1. That it was vague, gave no date, and consequently prejudiced him in his defence.

2. That in accordance with section 8, subsection 2, Act 20 of 1856, the second amount demanded (£32) was beyond the jurisdiction of the Court.

The Magistrate overruled the first exception, and sustained the second.

The defendant then pleaded in reconvention a balance of account amounting to £12 0s. 11d., alleged to be owing by the plaintiff to the defendant.

It appeared from the evidence that Dr. Lloyd, the plaintiff, had an open account with the defendant, and that some time last year the defendant agreed to deduct from certain moneys which he owed one Joubert, the sum of £25, and pay the same to the plaintiff, Joubert being the plaintiff's debtor to that amount.

Subsequently an account was rendered by the defendant to the plaintiff's agent, showing a credit balance in favour of Dr. Lloyd amounting to £13 9s. 4d. As the plaintiff objected to some of the items in the defendant's account no settlement was arrived at. Subsequently, in November, 1893, one Otto Jeppe undertook to pay Dr. Lloyd the £25 which the defendant owed the plaintiff in connection with Joubert's account. The plaintiff consented to this, but stated in his evidence that Jeppe never paid him the £25 promised, but he admitted that he had received £50 from one William Steenkamp on account of Jeppe, and in part discharge of a debt due by Jeppe to him, but which had no connection with the £25 transaction above referred to.

The evidence for the defence went to show that there had been a novation of the debt, and that the defendant's liability for the £25 was extinguished by the arrangement with Jeppe.

Failing to receive the £25 from Jeppe, the plaintiff wrote to the defendant on the 29th December, 1893, claiming payment of the £25, less a credit of £10 7s. 3d., which he acknowledged he owed the defendant, after deducting certain disputed items amounting to 18s. 8d. On the defendant's failure to pay the present proceedings were instituted.

The Acting Resident Magistrate gave judgment for the plaintiff for £13 0s. 10d. with costs, the following being his reasons:

In this case the issue rested on the fact whether the amount of £25 owed in the first instance by Joubert to plaintiff had ever been paid by either defendant or Otto Jeppe. It was proved and admitted on both sides that defendant (Horwitz) took upon himself the liability and afterwards transferred it to Otto Jeppe, who would appear to have accepted it and agreed to pay the money to the plaintiff.

It was not proved that this £25 had ever been paid to plaintiff, and no effort apparently had been made on the part of the defendant to secure the attendance of Otto Jeppe, consequently there was no evidence to rebut the statement made by the plaintiff that the money he received from one Steenkamp on Otto Jeppe's account was a debt owing by Otto Jeppe to him.

The Court, taking into consideration that it was well known that the plaintiff was settling his affairs as he was shortly leaving the Colony (it was so stated in court), and seeing no reason to doubt plaintiff's statement, which was given very clearly, that the money he received from one Steenkamp was a payment on Otto Jeppe's own account, and also that no effort seemed to have been made to secure Otto Jeppe's attendance, when it was obvious to all concerned that his evidence would have been valuable, gave judgment in favour of the plaintiff.

In arriving at the amount of the judgment, the sum of 1s. was added to the credit balance shown on the account sued upon, and the sum of 10s. for a gallon of brandy sold on the 21st November, 1893—which was not objected to by plaintiff—was deducted, which leaves a balance of £13 0s. 10d., for which amount the Court gave judgment.

The defendant now appealed.

Mr. Graham was heard in support of the appeal, and asked to put in an affidavit from Jeppe to the effect that he had paid Dr. Lloyd the £25.

The Court refused to receive the affidavit.

Mr. Sheil for the respondent.

The Court altered the judgment in the Court below to absolution from the instance on the claims in convention and reconvention.

The Acting Chief Justice said: In this case the plaintiff in the Court below practically sued for £25, which was not due to him by the defendant in the first instance, but was due to him by one Joubert. In support of his case he attempts to say that Horwitz undertook this debt for Joubert, and Horwitz in reply says: "That is true, but afterwards this obligation was extinguished by your accepting one Jeppe as your debtor." Jeppe was not called, and the evidence on this point is unsatisfactory. The onus seems to be on Dr. Lloyd to prove that the £25 is due by Horwitz to him. Horwitz's defence is that this £25 has been paid or ought to be paid by Jeppe. The real dispute was over this sum of £25, an amount beyond the Magistrate's jurisdiction, and therefore I think the Magistrate should on that ground have granted absolution. No exception was taken on that ground but the case was allowed to go to judgment, and after judgment comes on appeal to this Court. I think when people have a legal defence like that it is their duty to take it in the Court below, and not merely to raise it after the case has been decided on its merits. Therefore the judgment of the Court below will be altered to absolution from the instance on the claim in convention and in reconvention, but as it was the fault of the defendant not to take exception, I certainly would not give him his costs in the Court below. And as the appellant has practically succeeded on appeal though on totally different and new grounds which were not before the Magistrate in the Court below, and which except for the Court would not have been raised in this Court even now, we think both parties here should pay their own costs.

Mr. Justice Barry: It is quite clear there has been a good deal of blundering between the parties, and that this action should never have been instituted in the Court below. The dispute between the parties related to a matter beyond the jurisdiction of the Magistrate, and the Magistrate, I think, should have done what the Court now does—given absolution from the instance in convention, and again in reconvention, and inasmuch as the appeal has not been decided on the grounds alleged on the pleas, but on something discovered by the Court, both parties should pay their own costs. The result will be that the question of the £32, which whatever the decision of the Court may be must still remain in dispute, will be decided upon on its merits by the Circuit Court, so that in reality we are not

creating or fostering litigation but enabling the parties to have this case thrashed out before a competent tribunal.

Mr. Justice Upington: There having been no exception taken in the Court below, I think the Resident Magistrate was justified in coming to the conclusion which he did. What has been done is no reflection on him whatever. I must express my compassion with the Resident Magistrate at having to decide these intricate questions of law at all.

[Appellant's Attorney, G. Montgomery-Walker; Respondent's Attorneys, Messrs. Reitz & Herold.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

ROBERTS v. DUTHIE. { 1894. August 29th.

Slander.—Privileged communication—Damages

D. *acting* bona fide *and without malice, told* L., *the wife of one of her husband's tenants, that* L.'s *daughter* E., *a child of 13, was in the family way by one* R.

E. *had been in the service of* D. *and used to attend* D.'s *Sunday-school.*

The statement made by D. *to* L. *with regard to* E. *was untrue.*

Held, *in an action for damages for slander brought by* R. *against* D., *that the communication made by* D. *to* L. *was privileged.*

This was an action for £500, damages for slander instituted by Mr. Walter Roberts, of Knysna, against Mrs. Augusta Vera Duthie, also of Knysna.

The declaration alleged that on or about the 14th March, 1894, the defendant wrongfully, unlawfully, and maliciously spoke of and concerning the plaintiff to one Aletta Lawrence the following false, scandalous, and defamatory words:

"Your daughter Ellen," meaning one Ellen Lawrence, "a child then of thirteen years of age, is in the family way from Mr. Walton Roberts," meaning the plaintiff.

The defendant intended by the said words to mean, and they do mean, that the plaintiff had illicit intercourse with the said Ellen Lawrence, a child under the age of consent, and was a man who had been guily of immoral and dishonourable conduct.

By reason of the wrongful conduct of the defendant as aforesaid the plaintiff has been much injured in his good name and reputation, and has sustained damages in the sum of £500.

The plaintiff claimed £500 damages with costs.

The defendant in her plea admitted that in or about March, 1894, she told Aletta Lawrence, who is the wife of a tenant of defendant's husband, that she heard that the plaintiff had had carnal connection with Ellen Lawrence, aged about thirteen years, the daughter of Aletta Lawrence; she said that she made the said statement *bona fide* and without malice, and in order that the reports that she had heard with regard to such improper intercourse between the plaintiff and the said Ellen Lawrence might be investigated; and that by reason of the above facts and the relations existing between herself and the said Ellen Lawrence, who had been in her employment and to whom she was imparting religious instruction, the said statement was privileged in law.

Mr. Rose-Innes, Q.C., and Mr. Jones appeared for the plaintiff.

Mr. Schreiner, Q.C., and Mr. Watermeyer for the defendant.

Aletta Lawrence said: I reside at Belvedere, Knysna, and my husband, who is a labourer, has been a tenant for twenty years of Mr. Duthie. I have a daughter named Ellen, aged thirteen. Some time ago my daughter worked for Mrs. Duthie about two weeks. After she had left her service I heard some talk about my daughter. Mrs. Duthie came to my house, and said she had heard that Ellen was not quite right. I said: "What do you mean by saying she is not all right?" Mrs. Duthie replied: "She is in the family way by Roberts." I said: "Missus, that is not so." Mrs. Duthie said she was very sorry, because Ellen was a child belonging to her Sunday-school. Afterwards she took Ellen to the doctor, who said: "She is all right; take her home." When I told Mrs. Duthie what the doctor had said, she asked me whether the doctor had examined the child. I said: "No." "Well then," said Mrs. Duthie, "the doctor can't say." She then gave me a letter to take to the doctor, who sent one back to Mrs. Duthie. She said: "That is all right, and I can show that letter to anybody. Now you must go to Mr. Roberts to ask him his forgiveness for both of us." I went (continued witness) to Mr. Roberts, who said: "You have no need of

forgiveness for you have done nothing, but if Mrs. Duthie wishes to be forgiven she must write and ask for it." I sent my husband to convey this message to Mrs. Duthie, who sent a letter in reply to Mr. Roberts, which I delivered.

Cross-examined: Mrs. Duthie has always been extremely kind to me, and has helped me in times of trouble. I do not speak English well. If Mrs. Duthie were to say that what she said was not that the girl was *enciente* but that she had done something wrong with Roberts, I should not be prepared to contradict her.

Walter Roberts deposed: I buy and sell wood and do a little farming at Belvedere. I have known the woman Lawrence ever since I was a boy. I received the following letter from the defendant in reply to my request for a retractation: "I am very glad to have been the means of clearing your character in this instance, and you ought to feel yourself deeply indebted for the trouble I have taken in the matter. More than this I shall not say." On receipt of this letter I consulted an agent, and took the present proceedings. The rumour that I had misconducted myself with the girl Ellen first originated two years ago, and it was generally repeated after the girl's visit to the doctor.

Cross-examined: There had been no previous ill-feeling between the Duthies and myself.

[It being admitted that Mrs. Duthie was not actuated by malice, no evidence was called for the defendant.]

Mr. Rose-Innes, Q.C.: The defendant to succeed on her plea of privilege must prove that she had a duty towards the child coupled with an interest, and of this there is no evidence, but even if there were such a duty the defendant went too far in mentioning the plaintiff's name as there was no social, moral, or religious duty imposed upon her to do so. *Davis* v. *Snead* (5 Q. B., 608); *Diepnaar* v. *Hauman* (3 Ros., 37).

Mr. Schreiner, Q.C., cited *Cilliers* v. *Pienaar* (1 Sheil, 201).

Judgment was given for the defendant with costs.

The Acting Chief Justice delivered judgment as follows: This is a case which in my opinion ought never to have been brought into court. The plaintiff alleges that the defendant made a statement about him which is certainly highly defamatory, as it alleges he had illicit intercourse with a child under the age of consent, and not only affects his moral character, but accuses him of having committed a serious criminal offence. I am glad to find that the charge was without foundation, and after the investigation which has taken place, there does not rest the slightest stigma on the plaintiff. The question simply is reduced to this: Was this statement to the mother, which was admittedly made without malice, made on what is called a privileged occasion? Privilege has been so often defined in these slander cases that I need only refer to the one definition given in the case quoted by Mr. Innes: "That it must be a communication made *bona fide* by a person upon a matter in which he has an interest, or in reference to which he has a duty to a person having a corresponding interest or duty." Who made the communication in this case? Mrs. Duthie, in whose service the girl had been, and in whose Sunday-school class she then was. She certainly, I think, had an interest, and a very strong interest, in this child. To whom did she make the communication? To the mother of the child. Mrs. Duthie having heard certain statements, and acting in perfect good faith, had both an interest and a duty in making the communication, and the person to whom the communication was made certainly had an interest in receiving the communication. The utmost that can be argued in this case is: Did the communication go beyond what was necessary in indicating plaintiff as the person by whom the child had been improperly dealt with? In reference to a communication of this kind, I think a most essential part of it would be to say by whom the injury, according to rumour, was supposed to have been done, and in mentioning the plaintiff's name to the mother of the child I do not think the defendant went beyond what the occasion required. That the defendant acted *bona fide* in this matter is shown by the fact that in the very lady-like letter which she afterwards wrote to the doctor she carefully omitted all reference to the defendant, and on receiving an assurance that the examination had been satisfactory she at once informed the defendant of the results, stating that his character had been cleared. He ought, I think, to have rested satisfied with that, and he was ill-advised in going any further. This is a matter in which there is distinct privilege, and judgment will be given on that ground for the defendant with costs.

Mr. Justice Barry: I concur in thinking that this action ought never to have been brought. It is said to be hard on the plaintiff that words of this kind should have been used about him. But we live in society and enjoy certain privileges from it, and we must take the good with the bad. It is necessary for the protection of society that certain communications should be made as a matter of duty to persons interested. I do not think the plaintiff can say that his position in society has been much injured by what has taken place in the present case. I think he should rather thank the defendant for

bringing this matter to an issue after these rumours had been in existence for two years, and showing that they were entirely false. He was, I think, extremely ill-advised in bringing this action, and if this matter is now published to the world, he has only himself to thank. As to the argument that the communication by the defendant to the girl's mother went beyond what was necessary, I think that in a case of this kind, where the girl was alleged to have received injury at the hands of a particular man, it was necessary to mention his name, in order that the mother might protect her daughter from the tongue of scandal in the future, and also against the possibility of any impropriety taking place. From every point of view, therefore, I consider that this is an action which ought never to have been brought.

Mr. Justice Upington concurred.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

ROSSOUW'S EXECUTOR DATIVE AND HEIRS v. ROSSOUW'S EXECUTOR TESTAMENTARY. } 1894. August 29th.

Will—"All our children"—Construction.

R. *and his wife executed a mutual will, which contained* inter alia *the following provision:* "Further we declare it to be our express wish and desire that the immovable property belonging to our estate, that is, De Plaat (now our dwelling-place) and portion of the farm Schalkwyk's River, remain in the undisturbed possession of the survivor until his or her death, when the same shall have to be publicly sold, when *all our children* shall come in as heirs in equal shares as regards the proceeds of the same."

R. *and his wife had no issue of their marriage, but by a previous marriage* R. *had nine children, and his wife by a previous husband two children.*

Held, *that the expression* all our children *referred to the children of both the previous marriages, and that each such child or his representative was entitled to* $\frac{1}{11}$*th of the proceeds of the property.*

This was a special case, stated for the determination of the Court in the following terms:

1. The first-named plaintiff is the duly appointed executor dative of the estate of the late Daniel Jacobus Rossouw, hereinafter called the testator, who was at the date of his death married with community of goods to Gertruida Jacoba Rossouw (born Du Plessis), since deceased, hereinafter called the testatrix.

2. The testator and testatrix were married in the year 1872, and at the date of their marriage the farms hereinafter referred to were registered in the name, and were the property of the testatrix. No children were born of the marriage of the testator and testatrix, but of a previous marriage of the testator were born nine children, who are still in being, and are the other plaintiffs in this suit, and of a previous marriage of the testatrix were born two children (daughters), one of whom is still in being, and the other of whom died after the testator, but has left issue still in being, and the surviving daughter and the aforesaid issue are represented by the defendant in this suit, who is the executor testamentary of the estate of the testatrix.

3. The testatrix and testator on the 13th day of December, 1877, duly made and executed their mutual will (a sworn translation whereof is hereunto annexed and marked "A") whereby *inter alia* they made the following provision: "Further we declare it to be our express wish and desire that the immovable property belonging to our estate, that is, De Plaat (now our dwelling-place) and portion of the farm Schalkwyk's River, remain in the undisturbed possession of the survivor until his or her death, when the same shall have to be publicly sold, when all our children shall come in as heirs in equal shares as regards the proceeds of the same."

4. Thereafter the testator died in the year 1881, leaving the said will unrevoked, and the surviving spouse, the testatrix, adiated under the said will and accepted the benefits by it conferred upon her, and remained until her death in undisturbed possession of the immovable property aforesaid.

5. On the 16th day of April, 1883, the testatrix, then a widow, made and executed a will (a sworn translation whereof is hereunto annexed and marked "B"), and thereafter she died; and the defendant is her executor testamentary duly appointed.

6. The immovable property aforesaid has been by the defendant sold by consent under order of this Honourable Court (copy whereof is hereunto annexed and marked "C"), and realised the price of £2,285. The proceeds of this sale are now awaiting the further order of this honourable Court.

The plaintiffs contend: That each of the aforesaid children of the testator and testatrix (including by representation the issue of the deceased daughter of the testatrix) is entitled to one-eleventh share of the proceeds aforesaid, under the mutual will aforesaid, and that nothing in the subsequent separate will of the testatrix can affect the rights of the said children in respect of the said proceeds.

The defendant contends:

(*a*) That the only persons appointed heirs to the proceeds of the said landed property were the children of the marriage of the testator and testatrix.

(*b*) That as no issue were born of the said marriage, one-half of the proceeds aforesaid should be administered under the will of the testatrix dated 16th April, 1883, and the other half should go to the children of the testator by his former marriage.

Or alternatively:

(*c*) That the said last will of the testatrix is valid so far as half the said proceeds are concerned, and that half the said proceeds should be registered under it, and the other half under the testator's will.

Wherefore the parties pray for the judgment of this Honourable Court upon their respective contentions, and pray that this honourable Court may be pleased further to direct by whom the said proceeds shall be administered, and in what proportion executors' fees shall be paid to the first-named plaintiff and the defendant, and to order that the costs of this case may be paid out of the proceeds aforesaid.

Mr. Schreiner, Q.C., and Mr. Sheil appeared for the plaintiffs, and relied on *Du Preez* v. *Du Preez* (1 Juta, 259).

Mr. Rose-Innes, Q.C., for the defendant.

Judgment was given in favour of the plaintiff's contention.

The Acting Chief Justice said: This case seems even stronger than the case of *Du Preez* v. *Du Preez*. In that case "our children" we held to mean the children of the testators by a previous marriage, and the children of both by their subsequent marriage. In this case the words are "all our children," as though to emphasise the fact. Judgment will be given in favour of the plaintiffs' contention.

Mr. Justice Barry: I concur. "All our children" would *primâ facie* mean all the children of the testator and testatrix by both marriages, and the language in the will clearly points to the same conclusion.

Mr. Justice Upington concurred.

[Plaintiffs' Attorneys, Messrs. Findlay & Tait; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

JONES AND CO. V. WEISMAN.

On the motion of Mr. Graham, leave was given plaintiff to attach certain money to found jurisdiction, and to sue by edict.

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

NANNUCCI V. PEDERSEN BROS. { 1894. August 30th.

Mr. Schreiner, Q.C., asked for a decree of civil imprisonment upon a judgment against the defendants, the amounts owing being £25, the original debt, and £19 16s. 10d., taxed costs.

Granted.

VAN WYK'S EXECUTORS V. BICCARD.

Mr. Graham asked for judgment under rule No. 329 in respect of various debts amounting in the gross to £2,482 15s. 1d., less an amount of £498 10s. 7d.

Granted.

HOFMEYR V. DEAN.

Mr. Maskew asked for judgment for an amount of £22 2s. 6d.

Granted.

VAN DE SANDT DE VILLIERS AND CO. V. BICCARD.

Mr. Maskew moved for judgment for an amount of £27 2s. 7d.

Granted.

SELLAR BROS. V. DEAN.

Mr. Webber moved for judgment for an amount of £6 14s. 3d.

Granted.

HALSE V. HALSE.

This was an action *de lunatico inquirendo*.

Mr. Molteno appeared for the plaintiff, and read the evidence taken on affidavit, which clearly went to show that the defendant is of unsound mind.

The Court declared the defendant of unsound mind, and appointed a curator of his person and property.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE JOHANNES J. STEMMETT.

Mr. Jones asked for authority to the executor of the said estate to sell certain landed property, being portions of the farms Langevallei, Diepkloof, and Rietvallei, by public auction or by private contract, the same being too small for the occupation thereof by all the heirs, and it being for the benefit of the minors concerned that their shares should be disposed of together with those of the majors.

The Court granted the order in terms of the Master's report.

THE PETITION OF HAROLD R. LAWRENCE.

Mr. Watermeyer applied for leave to sue by edictal citation in an action against his wife for restitution of conjugal rights, failing which for a decree of divorce, by reason of her malicious desertion.

The order was granted.

IN THE INSOLVENT ESTATE OF STEPHANUS I. LANGE.

Mr. Benjamin applied for the confirmation by this Court of the appointment of John Pooley by the High Court of Griqualand as trustee of the said estate, for the purpose of enabling him to deal with certain assets in the Colony, but beyond the jurisdiction of the High Court.

Granted.

CARL V. CARL.

Mr. Jones asked the Court to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against his wife for divorce, by reason of her alleged adultery.

The application was granted.

SPIERS V. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK. { 1894. August 30th. „ 31st.

Life insurance—Proposal form—False answers—Material facts—Misrepresentation—Agency.

Where it was proved that a woman about to insure her life had given false answers to the questions in the proposal form knowing them to be false, and the doctor who examined her on behalf of the Insurance Co., though not its regular medical officer, knew that some at least of the answers were false and yet signed the proposal form.

Held, *in an action by the woman's executor against the company for the amount of the policy, that the company was not liable.*

This was an action for £200 (the amount of a policy of life insurance) instituted by John Spiers, in his capacity as executor testamentary of the estate of the late Mary Elizabeth Spiers, against the defendant company.

The declaration alleged that on the 9th August, 1893, the defendants and the late Mary Elizabeth Spiers entered into a written agreement, by which the defendants agreed in consideration of the sum of £3 17s. to insure the life of the said Mary Elizabeth Spiers, in favour of her legal representatives, for the sum of £200 for a period of four months, upon the condition *inter alia* that if the defendant company in New York accepted the said insurance a proper policy would be made out and delivered, but that if the company at New York should not agree to continue the said insurance the said amount should be repaid.

The said amount was paid by the said Mary Elizabeth Spiers, and received by the defendants.

That on the 29th October, 1893, and while the said agreement was in full force and effect, the said Mary E. Spiers died, and thereupon the sum of £200 became due and payable to her legal representatives.

The plaintiff claims :

(*a*) The sum of £200, with interest *a tempore moræ*.

(*b*) Alternative relief with costs.

The defendants admitted the formal allegations in the declaration, and that Mrs. Spiers died on the 29th October, 1893. They annexed to the plea a copy of the agreement or certificate referred to in the declaration and craved leave to refer to it. The company then specially pleaded as follows :

3. The said certificate was granted in consideration of the application of the deceased Mary Elizabeth Spiers, for a policy of assurance, which application was thereby made part of the contract, and in further consideration of the payment of the sum of £3 17s.

4. The said application was made in writing on the 7th day of August, 1893, and therein the deceased Mary Elizabeth Spiers made certain statements and answers to questions which are hereinafter set forth, and entered into an agree-

ment in the following terms: "I also agree that all the foregoing statements and answers, as well as those that I make to the company's medical examiner in continuation of this application, are by me warranted to be true, and are offered to the company as a consideration of the contract. . . ."

5. In reply to the question whether she had ever had any of the following diseases: spitting or coughing of blood, pleurisy or any chest or lung affliction, disease of the heart or palpitation of the heart, the deceased Mary Elizabeth Spiers answered "No," which answer was false in fact, as she had suffered from pneumonia in February, 1893, and had also been treated for palpitation and disease of the heart.

6. In reply to the question "State particulars of any illness, constitutional disease, or injury you have had, giving date, duration, and remaining effects, if any?" the deceased Mary Elizabeth Spiers answered that she had never had any illness of consequence, which answer was false in fact, as both in February and March, 1892, and in February, 1893, she suffered from illnesses, to wit, Bright's disease and pneumonia, for which she was attended by one Dr. Key, a medical practitioner residing at Worcester, and had also suffered from palpitation and disease of the heart.

7. In reply to the question, "Names and addresses of physicians who have attended you?" the deceased, Mary Elizabeth Spiers, answered, "Dr. Ford, Worcester," which answer was false in fact, by reason that it suppressed the truth, to wit, that she had been theretofore in 1892 and 1893 attended as aforesaid by the said Dr. Key.

8. By reason of the premises the contract embodied in the said certificate was *ab initio* null and void in terms of the agreement above recited, and the plaintiff is not in law entitled to have and maintain this action.

9. Before action brought the defendant company offered to return to the plaintiff the amount of £3 18s. which was paid by the deceased, Mary Elizabeth Spiers, as set forth in the said certificate, and for the stamps on the policy if issued, and the defendants are ready and willing at any time to return the said amount.

10. Save as aforesaid, they deny the allegations in paragraphs 2, 3, and 4 of the declaration.

Wherefore the defendants pray that the plaintiff's claim may be dismissed with costs.

The replication was general, and issue was joined on these pleadings.

Mr. Graham and Mr. Watermeyer for plaintiff.

Mr. Schreiner, Q.C., and Mr. Benjamin for defendant.

The onus being on the defendants, they opened their case.

Dr. James Key, of Worcester, said he had known the late Mrs. Spiers from about 1891. He first attended her at the beginning of 1892—in February and March—and from the entries in his book of visits he found that she was suffering at that time from disease of the heart. She complained of palpitation, and was treated accordingly. Witness did not lay any stress on the character of the disease; he rather endeavoured to allay the patient's alarm. There were also indications that she was suffering from Bright's disease, but on examining the urine he found no trace of acute symptoms. The case afterwards passed out of his hands owing to his own illness, but in February, 1893, he was again consulted. On a careful examination he found that the right lung was condensed to the extent of one-half, and he warned her to be very careful in carrying out whatever her family attendant instructed her to do. In October of the same year he attended her again. On the 25th, Dr. Esselen was called in. Four days later the patient died, the immediate cause of death being acute Bright's disease. She was also suffering from hemorrhage of the lung, but he believed that but for the more serious malady she might have lived.

Cross-examined: Mrs. Spiers seemed of a calm, placid, and resigned disposition. She probably despaired of her recovery. He thought it discreet not to alarm Mrs. Spiers, and avoided the use of the term heart disease in describing her ailments. He was quite sure that he mentioned to Dr. Esselen the fact that Mrs. Spiers was suffering from Bright's disease, though the urgent symptom was bleeding from the lungs. It was not true that he had been assisting the company to work up this case, nor was it his intention to throw up medicine and go in for law.

Mr. Henry Basil Roper, Inspector of Prisons, said that he knew Mrs. Spiers, who was wife of the gaoler at Worcester. On July 28, 1893, he visited the prison there. Spiers was anxious to be transferred to Cape Town on the ground of his wife's delicate state of health and the unsanitary condition of the prison quarters. He said that her heart was affected and her lungs weak.

Cross-examined: Witness knew that there were other reasons why Spiers wanted to leave Worcester. He did not get on with some of the officials there. The prison quarters were damp, and in one of the rooms there was a bad smell.

Mr. John James Graham, Secretary of the Law Department, proved that on the 18th August, 1893, Spiers saw him personally, and told him the doctor had certified that his wife was suffering from heart disease. At the same time he produced a medical certificate testifying to that effect, and saying that she was unfit any longer to perform the duties of matron. Witness referred him to the Magistrate, through whom a formal application was made for his removal to Cape Town.

Mr. Archibald McCorcandale, manager of the defendant company, said that their regular medical adviser for Worcester was Dr. Hugo, and in his absence in Europe last August, the certificate of Dr. Ford was accepted in Mrs. Spiers's case.

Mrs. C. A. J. Herbst, of Swellendam, said that one time her husband was gaoler and afterwards Chief Constable at Swellendam. She knew Mrs. Spiers, and was on friendly terms with her. Latterly she complained frequently about her heart.

Eliza Moulton deposed that she had lived for many years at Swellendam, and was on terms of intimate friendship with Mrs. Spiers. When first she knew Mrs. Spiers she seemed a very healthy woman, but for about three years prior to her death she had suffered from palpitation of the heart and giddiness. After Mrs. Spiers left Swellendam and went to Worcester, witness visited her on two occasions for long periods.

Mrs. Katrina van As, a midwife, who attended Mrs. Spiers in August, 1893, gave similar evidence.

This closed the case for the company.

Dr. G. W. Ford, of Worcester, said he knew the late Mrs. Spiers very well. In November, 1892, he was called in to examine her, and at that time she was suffering merely from nervous debility. There was nothing the matter with her lungs and heart, nor were there any symptoms of Bright's disease. In May, 1893, he again examined her. She was still free from those maladies. On the 28th July, however, he discovered a slight murmur at the base of the heart, due, as he believed, to certain causes, but not to any organic disease. Witness examined Mrs. Spiers at the request of a man named Wilkinson, agent of the company, in August, 1893, in connection with her proposal for insurance. He wrote down the answers to the questions in the printed proposal form, as Mrs. Spiers gave them. On that occasion he found no organic disease of the heart, and no trace of lung mischief, while there were no symptoms of Bright's disease. Her family history was very good.

Cross-examined: In November, 1892, Mrs. Spiers complained of palpitation and nervousness. It was true that on the 28th July, Mrs. Spiers was suffering from heart disease, as stated in the certifiuate. Ten days later he made the statement on the proposal form that she was not suffering from heart disease.

The Acting Chief Justice: I must say that your evidence staggers me in face of this certificate.

Mr. Justice Upington: It staggers me too.

In further cross-examination witness explained that the July certificate was intended for such an insignificant purpose that he did not care to enter into technicalities, and consequently described as heart disease what in reality was not an organic disease at all. At the time he filled up the proposal paper, witness did not know that she had been attended by various other doctors.

Dr. Louis Esselen, District Surgeon of Worcester, deposed that he knew Mrs. Spiers and had examined her dozens of times. He never discovered anything the matter with her heart and lungs. Dr. Key never gave him to understand that she was suffering from Bright's disease. The first intimation he received from him that the presence of Bright's disease was suspected, was on the afternoon on the day she died. He then sent for a specimen of urine. He adhered to his certificate, stating that the cause of death was hemorrhage of the lungs, consequent on an attack of influenza. He did not notice any pronounced dropsical swelling or any other symptoms of Bright's disease.

John Spiers, guard at the Kimberley prison, said that he had been in the employ of the Government since the 13th February, 1880, and prior to that period served for twenty-one years in the Connaught Rangers, being discharged as sergeant. His own life was insured for £500 in the old Mutual. He knew an insurance agent named Wilkinson, who called upon him in August last year, and explained to his wife the advantages of life insurance. Mrs. Spiers said she did not see her way clear to insure, as her husband's premium fell due in August. Witness, however, said that there was a surplus left after he had paid his premium out of his pension. She consented to take out a policy. Wilkinson then filled in an insurance proposal form, writing down her replies as she gave them. He did not read the whole of the printed questions. Subsequently Dr. Ford was sent down by the insurance agent at his own initiative, and not at her request. During the time they lived at Swellendam, his wife, who was naturally weak and excitable, complained of a fluttering of the heart, but Dr. Shand

examined her and found that there was nothing organically wrong. She was afterwards examined by Drs. Esselen, Key, and Ford. Dr. Key told him that his wife's lungs were weak, and that the action of the heart was weak also. He told his wife what the doctor had said. Dr. Key said there was no immediate danger, and his wife might live to be a great-grandmother. His wife was poorly educated, but she could read a book and sign her name to the pay list. Some time after the insurance was effected his wife developed a cough. She also had a miscarriage. At no time was it ever hinted to him by the medical men whom he consulted that his wife was suffering from Bright's disease.

Cross-examined: He did not believe that his wife, being an illiterate woman, knew what she was signing at the time the proposal form was filled up. He considered that on the 9th August his wife was in fairly good health.

Mr. Graham, on the question of Dr. Ford being the agent of the company, cited *Anderson* v. *Fitzgerald* (4 H.L.C., 484) and *May on Insurance* (2nd Ed., p. 303).

Mr. Schreiner, Q.C., was not called on.

The Acting Chief Justice said: This is an action upon a policy of life insurance effected with the defendant company on the life of Mrs. Mary Elisabeth Spiers, of Worcester. The company has its head office in New York. An application was made to insure to the local agency, and the office, on accepting the application, granted a certificate on payment of the premium agreeing to insure the life for four months, pending reference to the head office. The lady whose life was insured signed an agreement, of which one clause runs: "I also agree that all the foregoing statements and answers, as well as those I made to the company's medical examiner in continuation of this examination, are warranted to be true, and are offered to the company as a consideration of the contract." The lady was examined by Dr. Ford, of Worcester, who was not the medical officer of the company, but acted in that capacity on the present occasion. A number of questions were put by Dr. Ford to the lady, and answered by her. He has sworn that he recorded her answers, and that what was recorded by him was upon the information gathered from her. A number of most important and material questions were asked, and a number of those questions we must find on the evidence were wrongly, improperly, and untruly answered. Among the principal questions relied upon by the defendant is the following: "Have you had any of the following diseases--spitting or coughing of blood, pleurisy, or any chest or lung affection, disease of the heart, or palpitation of the heart?" The answer was: "No." The evidence, however, shows that she had had spitting of blood prior to this time, and that this was a fact within the knowledge of the woman, though it may not have been within Dr. Ford's knowledge. Again, the statement that she had never had any affection of the lungs or chest was clearly false. I will not say, however, that it was false with the knowledge of Dr. Ford. Dr. Key, who examined the woman in February, told the husband that there was lung mischief, and although Dr. Ford says he knew nothing about this, the woman was certainly aware that such was the case. As to the statement that she had no disease of the heart, that was untrue, to the knowledge of the doctor as well as of the woman. For many years previously this woman had suffered from disease of the heart, she had been examined by a number of doctors, and Dr. Key told her that she was really suffering from this complaint, though he intimated it in such a way as not to arouse her fears. On the 30th July moreover, Dr. Ford granted this certificate: "This is to certify I have examined Mrs. Spiers, matron of the Worcester Gaol, and that I find her suffering from disease of the heart." This was only nine days before the date of the examination made by Dr. Ford on behalf of the company. The husband of this lady also wrote to the Government on August 23, applying for removal on the ground of the ill-health of his wife, who was suffering from heart disease. So we have the certificate of the 30th July and the letter of the 23rd August, in both of which it is stated that Mrs. Spiers was suffering from heart disease, and yet in the intermediate period on 19th August we have Mrs. Spiers saying and the doctor certifying that no such thing existed. The evidence on this point is overwhelming to show that Mrs. Spiers's answer was false, and that it was false also to the knowledge of the doctor. "Palpitation of the heart?" "No." The evidence showed that the lady often suffered from that complaint. Then the applicant is requested to "state particulars of any illness, constitutional disease, or injury you have had, giving date, duration, and remaining effects, if any?" The answer is "Never had any illness of consequence." The doctor may not have had any knowledge to the contrary, but from the letter written by the husband, it appears that the lady was so seriously ill that she had to be sent from Swellendam to Cape Town, and was here attended by Dr. Petersen. He says: "I beg to state my wife was under his care for fourteen days, three years ago, with good effect." Not a word is mentioned of this. Then the

question is asked, "When did you last consult a physician?" "Fourteen days ago." "What for?" "Ordinary catarrh." Dr. Ford admits that just before this examination Dr. Ford had himself attended Mrs. Spiers for influenza and he put that down in the medical certificate sent to the company as ordinary catarrh. If this does not amount to misrepresentation I do not know what does. There are other false statements which must have been known to the doctor who signed this certificate. His only excuse is that certain matters escaped his memory. In the August of the previous year he had attended her when she was *enceinte*, and she afterwards gave birth to a child in November, 1892. The child only lived three months. Yet in answer to the question "Has she borne children—if so, how many and how recently?" Dr. Ford recorded the answer "Eight—youngest four years next birthday." "Is she now pregnant?" "No." Yet she was pregnant at that very time. If this is not a fraud, it at least shows the grossest negligence that can possibly be committed by a doctor in drawing up a report on such an important matter. It is contended that the doctor was the agent of the company and not of the person insured; but this case may be defended not on the ground whether the doctor deceived the company or not, but whether these material answers were correctly or incorrectly given by the person who signed this document, and whether or not the answers given were incorrect to her knowledge. It is clear that the answers were incorrect to her knowledge. She must have known that she had been spitting blood; she must have known of the lung disease, and of the trouble with her heart. Something has been said about the company not disputing cases except under special circumstances. I think it was the duty of the company in the present instance not to pay this amount, because the company has a duty to the public at large, and ought not to acquiesce in what was palpably a fraud. Under these circumstances, I must hold that the defence established in this case is sufficient to excuse them from liability on this policy, and judgment will be given for the defendant. As to the question of costs, we have heard Mr. Graham on the point, and while we think the agent should most distinctly have been called, still I think that the fact that he has not been called is not sufficient ground for refusing costs.

Mr. Schreiner intimated that not only would the company not ask for costs, but they would pay the costs of the plaintiff in the action.

Mr. Justice Barry concurred. He said: There has been a misrepresentation of material facts proved up to the very hilt, and the only wonder is that Dr. Ford, after giving the first certificate, should ever have given the second, and it is still more surprising that he should have ventured to go into the box and endeavour to prove that this woman had not heart disease.

Mr. Justice Upington concurred.

[Plaintiff's Attorney, C. C. Silberbauer; Defendants' Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

PETERSEN V. LITTLE. { 1894. August 31st.

Mr. Watermeyer asked for judgment in default of appearance for the sum of £60 1s. 7d., being for goods sold and delivered.

Granted.

BEEDLE AND CO. V. MEYERS.

Mr. Spencer moved for judgment for £50, being the amount of calls due on shares.

Granted.

FORREST AND CO. V. COWLING.

Mr. Duxbury moved for judgment for £29 odd for goods sold and delivered.

Granted.

Ex parte LEE. { 1894. August 31st.

Attorney—Admission—Act 27 of 1883, section 14.

L., *who had served articles of clerkship for five years with a solicitor in England, and passed the solicitors' intermediate examination, but failed in the final, on the 12th January, 1892, applied to be admitted as an attorney of the Supreme Court.*

L. *was ordered to serve for another year in the Colony, and at the expiration of that period, without having passed any examinations, applied to be admitted as an attorney and notary.*

The Court refused the application, holding that L. *could not be admitted until he had complied with the 14th section of Act 27 of 1883.*

This was a motion on notice to the Incorporated Law Society that application would be made to-day for the admission of Mr. Charles William Lee as an attorney and notary.

The applicant alleged in his petition that on 16th November, 1883, he passed the examination prescribed by the Incorporated Law Society of England pursuant to the regulations in force under the provisions of the Solicitors Act of 1877, which it is necessary to pass before articles of clerkship to a solicitor of the Supreme Court of England can be entered into, and which examination, it was submitted, is equivalent to the Matriculation Examination of the Colony.

Thereafter the petitioner served articles of clerkship for the full period of five years with a solicitor of the High Court of Justice, England.

In July, 1887, he passed the Intermediate Examination, which examination, the petitioner submitted, is equivalent to the second-class University Law Certificate of this colony.

In June, 1889, he presented himself for the "final examination," but failed.

Shortly thereafter, he came to the Colony, and on the 12th January, 1892, on his application to be admitted as an attorney of the Supreme Court the following order was made: "That petitioner's service in England be counted, but petitioner to serve one year in the Colony in order to be entitled to admission."

Pursuant to this order, on 1st May, 1892, the petitioner entered into articles of clerkship with Mr. Attorney Webb, of Queen's Town, and duly served under him for twelve months.

The petitioner now applied to be admitted as an attorney and notary without the necessity of passing any examinations.

Mr. C. H. van Zyl, president of the Incorporated Law Society, filed an affidavit in which he alleged, *inter alia*, that the petitioner stated in his original petition that he was prepared to pass the usual law examinations required in this colony for the admission of attorneys here.

That this petition was referred to the Law Society, and on the 19th November, 1891, at a meeting of the Council, the following resolution was passed:

"That the society has no objection to Mr. Lee's admission here, provided he passes the University Law Examination and the 'practical examination' required by our law."

That no mention was made in Mr. Lee's petition about his admission as a notary public, and this question was not considered by the Council of the Law Society.

That as far as deponent was aware no one applying under circumstances at all similar to those of Mr. Lee had been allowed to be admitted without, at any rate, passing what is known as the "practical examination."

That in Mr. Lee's case the Law Society intended that he should pass the University Examination in Law and Jurisprudence as well as the "practical examination."

That fully-qualified English solicitors seeking admission in this colony as notaries have to pass the "practical examination."

Mr. Juta, Q.C., was heard in support of the application and relied on *Ex parte Lewis* (3 Juta, 161).

Mr. Rose-Innes, Q.C, for the Law Society, was not called upon.

The Court refused the application.

The Acting Chief Justice, in giving judgment, said: The 14th section of the Legal Practitioners' Act, 1883, made a complete alteration in the law as to the admission of attorneys to this Court. The 14th section enacts that: "No person shall after the taking effect of this Act be admitted to practise as an attorney or notary who has not passed the examination prescribed by the University of the Cape of Good Hope." There are certain exemptions which do not, however, apply to this case, viz., English and Irish solicitors and Writers to the Signet in Scotland. It is contended that the Court in 1884 decided that the 14th section of Act 27 of 1883 does not apply to cases like that of the applicant, who has served five years in England. The case of *Ex parte Lewis* (3 Juta, 161) appears to me to decide nothing of the kind. The question at issue in that case was whether the Court would allow broken service to count. It is true that the judgment says the 14th section was not intended to apply to articles entered into in England, but the decision in that case does not apply to this case. Moreover the proviso to the section says that nothing in the Act shall apply to the admission or registration of any person who shall have been articled with a view to admission previous to the taking effect of the Act. The articles in that case were articles entered into previous to the Act coming into effect. All that has been previously decided is that service in England may count, but mere serving of an additional year out here does not absolve the applicant from passing the usual examinations. No order will be made.

Mr. Justice Barry and Mr. Justice Upington concurred.

[Applicant's Attorneys, Messrs. Sauer & Standen; Attorneys for the Law Society, Messrs. Van Zyl & Buissinné.]

MILNE V. MILNE. { 1894. Aug. 31st.

This was an action for divorce on the ground of the wife's adultery.

Mr. Buchanan for plaintiff. Defendant in default.

Wm. Jas. Milne, barman, of Simon's Town, said he was married on July 4, 1888. They lived happily until the end of January in the following year, when his suspicions began to be aroused regarding his wife's conduct. On the night of the 7th February he went out fishing, but sport being bad, he returned home unexpectedly, and found his wife standing in her night-gown by the side of the bed, while a seaman, named Griffiths, was undressed in the room adjoining. He knew Griffiths, and sometimes allowed him to sleep in the house. Griffiths slept in the house that night. Next day his wife went out, and sent the key of the house down to the bar in the afternoon, telling him to keep it until she returned. As the key was not sent for at seven o'clock in the evening witness went home, got into the house through the kitchen door, which was open, and found his wife, Griffiths, and another woman upstairs in the bedroom together. His wife explained that there was no time to get the keys, so she had asked Griffiths to get in through the front room window He did not say much to Griffiths, who was a bigger man that he was, but he ordered them both out of the house, and had not cohabited with his wife since. In May last defendant came to the canteen to ask for money with which to buy medicine for the baby, and then dropped a letter, written from H.M.S. Penelope by Griffiths, in a very amorous vein.

James Davis, labourer, formerly in plaintiff's employ, gave evidence that he had witnessed Mrs. Milne and Griffiths together on two separate occasions under very compromising circumstances.

The Court granted a decree, defendant to have the custody of the two children of the marriage, with costs.

FLEMING V. FLEMING. { 1894. Aug. 31st.

This was an action for divorce on the ground of adultery by the wife.

Mr. Benjamin for plaintiff. Defendant in default.

William Henry Fleming said he lived at Woodstock, and was married to Christina Susannah Alexander on the 28th March, 1892, there being no children of the marriage. On the 19th August last they separated owing to his wife's violent temper. She was in the habit of pelting him with plates, dishes, knives, and lamps, so he thought it better to leave her than to run the risk of being sent to the Breakwater. His wife went to live at 26, Hanover-street.

Francis van Sittart, photographer, of 26, Hanover-street, proved the defendant's misconduct with a lodger named Donelly on the 28th January last. He turned both of them out of the house.

A decree was granted with costs.

SUPREME COURT.

[Before Mr. Justice BUCHANAN, (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

GLADSTONE V. STABLEFORD. { 1894. Aug. 31st. Sept. 3rd.

Building contract — Extras — Damages — Action.

This was an action for £221 16s. 2d., stated to be due on a building contract, and also for £10 damages.

The declaration alleged that on 20th November, 1893, a written contract was entered into between the plaintiff and defendant in terms of which the plaintiff undertook to build a house for the defendant at Green Point, in accordance with certain plans, specifications, and memoranda attached to the said contract, for the sum of £975, to be paid by the defendant to the plaintiff upon the certificates from time to time of the architect employed, subject to certain provisions as to retention money. (Copy of the contract was annexed to the declaration.)

The declaration went on to say:

3. Thereafter the plaintiff commenced the erection of the said house in terms of the said contract, but on the 20th January, 1894, a second written contract was signed between the parties, in which it was recited that certain differences had arisen between them with regard to the interpretation of the first contract, and that the plaintiff and defendant had agreed to cancel the same and substitute the second contract in its stead; the plaintiff annexes hereto a copy of the said second contract marked B.

4. In terms of the said contract is was agreed that the contract price for the said house should be £1,000, to be paid on the weekly certificates of the architect, and on the completion of the work a final certificate was to be given by him for all retention money due under the first as well as under the second contract.

5. It was also provided that 20 per cent. should be deducted from each progressive certificate and placed to the credit of the contractor as retention money to be paid to him upon the completion of the work, less the sum of £50, which was only to be paid to the contractor at the expiration of thirty days after the date of the said completion.

6. In terms of the said contract it was also agreed that the defendant should forego any claim that he might have had for fines by way of damages, and should allow the plaintiff a reasonable time within which to finish the work, and also that the defendant shall be allowed to retain the sum of £50 sterling off the final certificate for the term of thirty days after the completion and delivery of the building, but that upon payment of the said sum of £50 all certificates granted by the architect should be considered as finally satisfied and not capable of being reopened in any way.

7. The plaintiff has in all respects carried out his part of the said contract, and the said house was duly completed by him on the 5th day of May, 1894, and the final certificate of the architect attained. In addition thereto he had performed certain extra work not included in the said contract, at the special request of the defendant or his architect, for which extra work the sum of £91 14s. 8d. is a fair and reasonable charge.

8. The defendant has not carried out his part of the contract. he has refused to pay to the plaintiff the full contract price for the said house and the amount due in respect of the said extras, and there is due to the plaintiff the sum of £221 16s. 2d., being the balance due in respect of the said contract and extras; the plaintiff annexes a memorandum showing the particulars of the said claim.

9. All things have happened. all conditions have been fulfilled. and all times have elapsed to entitle the plaintiff to be paid the said sum of £221 16s. 2d., yet the defendant refuses to pay any part thereof.

The plaintiff claims:

(*a*) Payment of the said sum of £221 16s. 2d.

(*b*) Such alternative relief as to this Court may seem meet.

(*c*) Costs of suit.

1. Or otherwise the plaintiff says that the defendant is indebted to him in the sum of £221 16s. 2d., being the balance of an account for work and labour done, material supplied, and money paid by the plaintiff for the defendant, and at his special instance and request, in and about the building of a certain house at Green Point.

2. All things have happened, all conditions have been fulfilled. and all times have elapsed to entitle the plaintiff to claim payment of the said sum of £221 16s. 2d., yet the defendant refuses to pay any part of the same.

The plaintiff claims:

(*a*) Payment of the sum of £221 16s. 2d.

(*b*) Alternative relief, with costs of suit.

The plaintiff further said:

That in or about April 26, 1894, and while he was lawfully engaged in building the said house, and was in possession of the works, the defendant wrongfully and unlawfully came upon the said works and forcibly and wrongfully took possession of certain tools and other property belonging to the plaintiff, and retained the same in his possession for some time.

Certain of the said tools have never been restored by the defendant to the plaintiff, and the latter has suffered damage in the premises in the sum of £10.

The plaintiff claimed £10 damages with costs.

The defendant in his plea admitted the execution of the contract "A" annexed to the declaration, and craved leave to refer to it for its terms.

He admitted that the plaintiff commenced the work in terms of the contract, and that thereafter contract "B" was executed between himself and the plaintiff; he said that it was the intention of the parties thereto that the contracts should be construed and read together, the first contract being modified by the terms of the second, and that this was the true intent and meaning to be placed upon the documents.

He admitted that the house was completed on 5th May, and the architect's certificate given save as to certain matters and things which had not been properly completed by the plaintiff, and which it was not now necessary to specify.

He admitted that the plaintiff did perform certain extra work not included in the contracts, but he denied that the value of the same was £91 14s. 8d.

He said that at the said date the plaintiff was indebted to him, the defendant, in certain sums, which he was entitled to deduct from the amount due to the plaintiff, and that on or about 21st May he tendered to pay to the plaintiff the sum of £58 at once, and further sums of £6 9s. and 18s. when and as soon as the architect had certified to the value of certain work represented by the said amounts, the said sums

to be in full satisfaction of all claims and demands arising out of the said contracts and claimable in this suit, with costs to date of tender, that he was still ready and willing and tendered to pay the said sums amounting to £65 7s. in all, the architect since the above date having certified to the value of the said work represented by the two items amounting to £7 7s. He said that he was further willing to pay the sum of £50 to the plaintiff as soon as a final settlement was arrived at between the parties, as provided by the contract.

Subject to the above tender he prayed that the plaintiff's claim might be dismissed with costs.

And for a plea to the alternative claim of plaintiff the defendant said:

He craved leave to refer to the matters above pleaded and to the tender made in the above plea, and subject to the said tender he prayed that the plaintiff's claim might be dismissed with costs.

And for a plea to the further claim of the plaintiff the defendant said:

He denied specifically each and all of the allegations in paragraphs 1, 2, and 3, and craved leave to refer to the tender pleaded in his first plea. He said that the said tender was fully sufficient in respect of all claims and demands in respect of the matters at issue in this suit.

Subject to the above tender, he prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., and Mr. McLachlan appeared for the plaintiff.

Mr. Schreiner, Q.C., and Mr. Webber for the defendant.

The plaintiff gave evidence at considerable length in support of his claim under the contract and for extras.

Mr. Robert Esdon, engineer to the Green and Sea Point Municipality, said that the excavations had been carried out on a more extensive scale than would have been necessary in order to fulfil the strict letter of the specifications. He did not think the charge for extras under his head was excessive. He estimated the total value of the work done not provided for in the specifications at £79 18s.

Frederick Wm. Wentzel, plumber and gasfitter, Edward Burton, painter, and Abdul Kassim, mason, also gave evidence.

This concluded the case for the plaintiff.

Defendant, on being sworn, said that he had not kept any of the original certificates given by the architect; they were either destroyed or mislaid. On December 2 the plaintiff called and asked for some money on account. He gave him his own cheque for £5 and another for £20, and £10 in cash, taking no receipt for the amount. He obtained the money from the cash-box belonging to Mr. Bartholomew, whose manager he was, giving a debit slip for it to the cashier. Mr. Bartholomew was not present. On March 10, after a conversation with Mr. Gladstone, he gave him a cheque for £50, writing across the face of it the statement that this would make the total amount paid on account of the work to £792 10s.

Mr. Geo. Scott, of the firm of W. & G. Scott, explained his view of the specificatious which he had assisted to prepare.

This witness was asked to explain what was understood in the contract by the words, *for which £12 is allowed*, referring to gas fixtures.

Mr. Rose-Innes, Q.C., objected to the question, but it was allowed, as the Court regarded the expression as a trade phrase which the witness might explain.

The witness then stated that the meaning of the expression was that if the employer supplied the articles he could deduct the price from the contract.

Mr. F. Cherry, architect, who had examined the building in dispute, and Mr. D. C. Watson, sen., architect, also gave evidence in support of the defendant's case.

After argument,

The Acting Chief Justice said: This case has taken some time, but really the actual points at issue are reduced to a very few items. It will be convenient in discussing these points to take the account as framed by the defendant. [After reviewing the various items in dispute his lordship proceeded.] We find therefore that the sum to which Mr. Gladstone is entitled for extras amounts to £36 16s. 2d., making a total of £1,036 16s. 2d. Mr. Gladstone says that he has only received on account £860. Defendant says he has paid altogether £870. Now the £10 which is in dispute here is connected with circumstances which I should like to have had cleared up. I think, however, the onus is upon Stableford to show that he paid the sum which he alleges he paid in cash. All his other payments were by cheque, and this item of £10 is the only one paid in cash. Mr. Gladstone has produced his books to show that he never gave credit for this amount. Mr. Stableford has produced no books whatever or any proof to show that this amount was really paid. As the onus is upon him, I do not think we can give him credit for more than the sum of £860, which Gladstone admits having received. The claim for £12, gas fixtures found by the defendant, has been considerably

argued. It is clear from the evidence that the gas-pipes, &c., are "fixtures," but Mr. Scott, who drew up the specifications, says he intended "fixtures" to mean "fittings" as well, though he admitted the two things are different. The contract says nothing about "fittings," and I do not see how we can read words into the contract which are not there. Consequently this £12 must go out, because what was required to be done was supplied by Gladstone. Taking the items all together we have a total sum of £899 9s. 6d. to the credit of Stableford. Deducting that amount from the total on the other side, there remains a balance of £137 6s. 8d. This is the amount to which the plaintiff is entitled. The defendant has tendered £115 7s., but as that is insufficient the judgment must carry costs. As for the claim for £10 damages, I certainly think that the defendant's conduct in this case is not what it ought to have been. He ought not to have improperly taken possession of this house, because by so doing he deprived the builder of the lien which he had over the property until he was properly paid. In this respect he did Gladstone a wrong, and forced him to come into court and get an order to attach the property, in order to secure the lien he would otherwise have had over it. Under these circumstances, and seeing that the amount tendered is insufficient, I have not the least hesitation in ordering that judgment be for plaintiff with costs.

Justices Barry and Upington concurred.

[Plaintiff's Attorneys, Messrs. Du Preez & Walker; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice), Sir JACOB DIRK BARRY, and Sir THOMAS UPINGTON, K.C.M.G.]

GENERAL MOTIONS.

Re ESTATE MEINTJES. { 1894. Sept 4th.

This was the petition of Christoffel Jacobus Brugman, in his capacity as executor dative of the estate of the late Barend Jacobus Meintjes, and of John Meintjes, in his capacity as tutor dative of the four minor children of Barend Jacobus Meintjes.

It appeared from the petition that Barend Jacobus Meintjes was married in community of property to Magdalena Elizabeth Maria Jordaan, who predeceased him, leaving her surviving the four minors above referred to.

Afterwards B. J. Meintjes contracted a second marriage, out of community, with Elsie M. E. de Lange, by whom he had two children.

Meintjes and his first wife executed a mutual will.

Meintjes died in September, 1893, without having made another will.

Amongst the assets in the estate of the late Meintjes is a part of the farm Vergelegen, acquired by him as a co-legatee under the provisions of his father's will, the remainder of his share in the farm being acquired from others of his co-legatees.

The only co-legatee who still holds a share in the farm besides the late Meintjes is his brother, Johan Frangois Meintjes.

Meintjes' father by his will left the farm to his six youngest sons, of whom B. J. Meintjes and J. F. Meintjes were two, subject to this condition: "That in case any of the legatees should at any time wish to sell or alienate his share in the bequeathed ground of the aforesaid farm, his co-legatees shall have the preference to purchase such share, and shall pay one-sixth of the value of the farm, which is valued at £1,000."

The petitioners alleged that should the fixed property be advertised for sale, J. F. Meintjes might claim the privilege under the will of his late father.

That the assets of the estate of B. J. Meintjes, except the farm property, had been realised and were insufficient to pay the whole of the liabilities, there being a deficiency of about £400.

That it would be to the interests of the minors that they, as heirs of their late father, should be allowed to take over the landed property.

That there was to their credit in the hands of the Master £600, their maternal inheritance.

That the farm was valued for Divisional Council purposes at £1,300, whilst the amount in case the property was advertised for sale, and J. F. Meintjes could claim to purchase the same, would be £500.

The prayer was for:

1. An order authorising transfer to the minors of the property.

2. That the Master be directed to pay out of the moneys to the credit of the minors whatever sum may be shown to be necessary for liquidating the estate of B. J. Meintjes, together with the necessary costs and charges in connection with the transfer to them of the property, and the costs of this application. The matter was before the Court on the 2nd August,

but stood over that notice might be given to J. F. Meintjes. The latter duly received notice to show cause why the portion of the farm belonging to his brother's estate should not be sold, but he did not appear.

The Master's report on the petition was as follows:

1. I have good reasons for saying that it would be better for the minors that the property in question should be sold and the proceeds paid into the Guardians' Fund.

2. If it be held that the condition with regard to alienation contained in paragraph 4 of the will of the late Johannes Meintjes lapsed with the death of the legatee, then no order of Court is required, as the executors of the latter could realise the property and account for it in the ordinary course.

3. If however the condition is to be considered still in force, then I beg to recommend that the tutor of the minors be authorised to take transfer on their behalf, and that he be at the same time directed forthwith after having obtained transfer to sell the property by public auction and to pay the proceeds into the Guardians' Fund, and that the Master be empowered to pay out of the moneys in his hands such sum as may be found to be due by the minors for liquidating the debts of their father's estate.

Mr. Sheil was heard in support of the application.

The Court granted the order in terms of the Master's report, the land to be transferred to the minors before sale.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

MOORE V. MOORE.

Mr. Innes asked the Court to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against her husband for a judicial separation, and for other purposes.

Granted.

THE PETITION OF CHARLES R. SYFRET.

Mr. Webber applied for an order directing the Master of the Supreme Court to pay to the administrators of the estates of petitioner's father and mother the amount due to him as maternal inheritance, the same being now in the Guardians' Fund, but producing no return by reason that petitioner has attained his legal majority, but not the age at which he is entitled under the will to receive the said amount.

The Court made a similar order to that made *In re Syfret's Estate* (2 Sheil, 382).

THE MASTER V. KEYTER.

Mr. Giddy asked for an order requiring the respondent to file liquidation accounts in the insolvent estates of Willem Andries Smit and Carl Frdk. Leo, of which he is trustee, and that he do pay the costs *de bonis propriis*.

The application was granted.

THE MASTER V. BICCARD.

On the application of Mr. Giddy, an order was made in the same terms as in the above case in the insolvent estates of Gert Christian Jacobus Theron and Pieter Willem van Eeden.

THE PETITION OF WILHELMINA H. GREEN.

Mr. Watermeyer applied for a rule *nisi* requiring Frank Bradford and others to show cause why they shall not be ordered to restore to petitioner certain furniture and other articles seized by them unlawfully, and by force or fraud removed from the place in which they were stored at Lady Grey.

The rule asked for was granted, and made returnable 12th October.

WHITTING V. WHITTING.

Mr. Watermeyer asked for a rule *nisi* requiring respondent to show cause why applicant, his wife, shall not be admitted to sue him *in forma pauperis* in an action for divorce by reason of his alleged adultery.

The rule was granted, and made returnable 12th October.

IN THE MATTER OF JOHANNES J. BADENHORST, A LUNATIC.

Mr. Maskew applied for authority to the curator to raise a sum of money on mortgage of the landed property of the estate for the purpose of discharging the liabilities, it being desirable that none of the movable assets or live-stock should be disposed of, but that they should be retained for the purpose of carrying on the farming operations.

Granted.

BUYSKES V. COSNETT AND HURLEY'S HEIRS. } 1894. Sept. 4th.

Life policy—Delivery — Effect —Will—Children—Tacit hypothec.

H. *and his wife were married without community of goods.* H.'s *wife died in 1887, and by her will she appointed her children by* H. *and a son of his by a former marriage sole heirs of her estate, which realised £6,150. She also appointed* H. *her executor,*

and directed that the whole of her estate should remain in the possession and under the control of her husband, until he should die or re-marry, to be used, applied and invested without the interference of any person as he might think best for the benefit of the heirs, and after the death or re-marriage of H. *she directed that the whole of her estate should be applied as in her will set forth.*

In 1885 H. *effected an insurance of £1,000 on his life for the sole use and benefit of his wife.*

H. *after the death of his wife entered into possession of her estate in terms of the will, and in 1893 he had lost it all in speculation.*

B. *after the death of* H.'s *wife undertook at his request to board and educate his four minor children in consideration of his paying £20 a month and recouping* B. *for any moneys expended by her in clothing and education.*

H. *paid* B. *regularly until 1890, when his payments fell into arrear and at his death in 1894 there was a large amount due to* B.

In August, 1893, H. *not being able to satisfy* B.'s *claim, which was then due, sent her the policy of insurance and also certain plate and jewellery which had belonged to his wife, requesting her to sell them and apply the proceeds in reduction of her account.*

B. *retained possession of the policy and plate.*

Held, *in an action by* B. *against* H.'s *executor and heirs that the property in the policy, plate, and jewellery vested in* B. *and that no tacit hypothec in favour of* H.'s *minor children attached to the same.*

This was an action instituted by Mrs. Julia Buyskes, of Wynberg, against Mr. John Howard Cosnett, in his capacity as executor testamentary of the estate of the late Daniel Richard Hurley.

The declaration alleged that the late D. R. Hurley and his wife, the late Eliza Hurley, were during their lifetime married without community of property.

The said Eliza Hurley died in or about the year 1887, and the said D. R. Hurley died on 7th March, 1894: there are living four minor children of the said marriage,

On the 15th August, 1885, the said D. R. Hurley effected an insurance on his life in the Union Assurance Society for the sum of £1,000.

4. Before her death, the late Mrs. Hurley executed her last will, and also a codicil thereto. In terms of the said will and codicil, she appointed her said children, with a son of her husband by a former marriage, to be the sole heirs of all her estate and effects, and she appointed the said Daniel Richard Hurley to be her executor; she further directed that the whole of her estate should remain in the possession and under the control of her said husband until he should die or remarry, to be used, appropriated, and invested without the interference of any person whomsoever, as he might think fit and best for the benefit of the heirs, and upon the death or remarriage of her said husband, she directed that the whole of her estate should be applied as in her will set forth.

5. Before his death the said Hurley executed his last will and testament, in terms of which he appointed his four minor children aforesaid to be the heirs of all his estate, and constituted the first defendant his executor testamentary.

6. From and after the year 1890, the plaintiff, who is a sister of the late Mrs. Hurley, undertook, at the request of the said Hurley, to board and educate the four minor children aforesaid upon the distinct understanding and agreement that the said Hurley should pay for the board of the said children, and should reimburse the plaintiff any sum expended for their schooling and maintenance.

7. In terms of the said agreement there is due to the plaintiff by the said Hurley the sum of £1,157 7s. 3d. Defendant annexes a memorandum, marked D, showing the particulars of the said amount.

8. In or about the month of August, 1893, the said Hurley, in order to satisfy the claim of the plaintiff in whole or in part, transmitted to her the said policy, and he also sent to her, through the African Banking Corporation, certain plate and jewellery which had belonged to the late Mrs. Hurley; the said policy and the said articles were sent to the plaintiff by the said Hurley in order that they might become her property to satisfy his indebtedness to her. The said policy and plate were duly received by the plaintiff in part satisfaction of the debt aforesaid; but the case containing the jewellery is still in possession of the said African Banking Corporation; the key of the case was received from the said Hurley by the plaintiff, who still has it, and the said Corporation hold the said case at the disposal of the plaintiff.

9. Thereafter the first defendant, acting on behalf of the plaintiff, and with her knowledge and

approval, pledged the said plate in order to obtain money for the payment of two quarterly instalments of premium due upon the said policy. The plaintiff herself thereafter paid another instalment of premium due as aforesaid.

10. The defendant wrongfully claims the right to the said policy and other articles as an asset in the estate of the said Hurley, and claims to distribute the proceeds thereof in satisfying claims against the said estate, and otherwise; the plaintiff contends that the property in the said policy and its proceeds, and in the other articles, is vested in her.

Wherefore the plaintiff claims:

(*a*) An order that the property in the said policy, plate, and jewellery is vested in her, and that she is entitled to realise them in satisfaction of the debt due to her, but subject always to the pledges aforesaid.

(*b*) Such other relief as to this Honourable Court may seem meet.

(*c*) Costs of suit.

The first-named defendant submitted to the judgment of the Court; the intervening defendants, through their *curator ad litem*, pleaded as follows:

They admitted the formal allegations in the declaration, but said that the late D. R. Hurley insured his life for the sole use and benefit of his wife, the late Eliza Hurley.

They put the plaintiff to proof of the amount of her claim for the board and lodging of Hurley's children.

They admitted that the plate and jewellery belonged to the late Eliza Hurley, and they said that it passed in ownership to her heirs at her death, and still belongs to them. They admitted that the plaintiff paid an instalment of premium due upon the policy of insurance, but they denied the allegations in paragraphs 8 and 9 of the declaration, and said that even if those allegations were true, the plaintiff is not entitled to the use and benefit either of the proceeds of the policy of insurance or of the plate and jewellery, to all of which they contended the heirs of the late Eliza Hurley are entitled.

They denied the contention of the plaintiff as set forth in paragraph 10 of her declaration, and said further as an alternative to their contention in the preceding paragraph of their plea that if the Court should hold the heirs of the late Eliza Hurley not entitled, as they contended, to the proceeds of the policy, that then and in that case the said proceeds form assets in the estate of the late D. R. Hurley, the father and natural guardian of the four minor children, and as such are liable with the other assets of the late D. R. Hurley to a tacit hypothec in favour of the children to secure the due payment to them of their shares in the sum of £6,150, which represents the value of the estate of their mother, disposed of by her will and codicil as received by their father, which during his lifetime he entirely wasted to the detriment of the heirs, including the minors, and which estate has been wholly lost to the said heirs.

Lastly, and in case the Court should overrule the pleas aforesaid and hold that the minors are not entitled to the tacit hypothec aforesaid, the defendants said that thee state of the late D. R. Hurley is indebted to the heirs of the late Eliza Hurley in the sum of £6,150, and that the four minors are each entitled, as against the said estate, to claim payment of one-sixth of the said sum under their mother's last will and codicil, and that in case the assets of the said estate be insufficient to pay all claims in full, then the claim of the minors is entitled to rank concurrently with those of other creditors of the said D. R. Hurley, including the plaintiff, in the final distribution of his estate, including the proceeds of the said policy of insurance. Wherefore they prayed that the plaintiff's claim might be dismissed, and that the Court might make such order as to costs as might be just.

Issue was joined on these pleadings.

Mr. Rose-Innes, Q.C., for the plaintiff.

Mr. Schreiner, Q.C., for the minor heirs.

Julia Buyskes, the plaintiff, deposed: I reside at Mortimer Hall, Wynberg, where I carry on a boarding-house. The late Mr. Hurley was married to my sister, and there were four children of the marriage, all minors at present. Mrs. Hurley's death took place in 1887. After that event the children stayed with Mrs. Beale, of Wynberg, for two months, but Mr. Hurley requested me to take charge of the children, and as soon as I had room I took them into my house, where they have lived ever since. I told Mr. Hurley that I could not keep the children and nurse for less than £20 a month, exclusive of extras, clothing, schooling. I was to render monthly accounts, which I did. Mr. Hurley paid this amount, and all extras, regularly up to September, 1890, but from that date until his death I received nothing.

My present account runs from 1st October, 1890, to the end of March, 1894, and I have received on account since then £115. Hurley's total indebtedness to me up to March, 1894, is £1,157 7s. 3½d. I have been keeping the children ever since March, 1894, but my account is only rendered to March, 1894. I frequently made demands on Hurley for payment of my account, but he put me off with promises that he would pay later on.

On 16th August, 1893, I received a letter from Hurley, in which he wrote to say that he was

forwarding through the African Banking Corporation his wife's jewellery, life policy, and silver service. These things he informed must be disposed of and the proceeds handed to me. He added that he could not do anything else, and that there was £34 15s. due on his life policy. Hurley sent the jewellery case to the African Banking Corporation, and the key of the case he sent to me with instructions as to how the case should be opened. The policy and plate were sent to me.

In a subsequent letter which I had from Hurley he writes that I will have to go to the African Banking Corporation personally, and give special directions for the opening of the jewel case. He also adds "that it is breaking his heart that he cannot pay me off and that he would do so shortly by hook or by crook." Thereafter I ascertained that premiums on the life policy of Hurley which I then had in my possession were becoming due. Mr. Hurley had given me previous notice of this in writing.

Shortly after I received the policy I handed it over to Mr. Cosnett in fulfilment of Hurley's instructions conveyed to me in writing when he sent me the policy, and Cosnett had told me that possibly he might be able to raise some money on the policy. He advised me to keep the policy and not to pledge it to pay the premiums. I thereupon sent in the plate and silver with instructions that these might be sold in order to pay the premiums on the life policy rather than allow the policy to lapse. Cosnett went to Mr. Lawton (of Fairbridge & Arderne's) and pledged the plate and silver for an amount which Lawton agreed to advance to pay some portion of the premium. I also, on my private account paid portion of the premium, probably the last quarter's premiums, and I handed my cheque to Lawton with instructions to pay the Insurance Company and to send me a receipt, which I think he did.

Mr. Hurley thereafter on the 7th March, 1894, died, and at that time the policy and the silver were in the possession of Lawton (of Fairbridge & Arderne), where they still are. The key of the jewel case is still with me and the jewellery is still held by the African Banking Corporation on my behalf.

I have been appointed by the Transvaal Government as guardian of the minor children, and my appointment has actually been issued by that Government. With the exception of myself there is no one who is willing to take charge of the children, three of whom are very delicate, and unless I had taken them after their father's death and had continued to provide for them they would have been cast upon the world in a helpless and destitute condition.

The material parts of Hurley's letter of the 16th August, 1893, are as follows:

* * * *I cannot do much, but forward by this mail through the A.B.C. Bank Eliza's* (his wife's) *jewellery life policy, and silver service; these things must be disposed of and handed over to you the results of sale for the time being. I cannot do anything else. There is £34 15s. due on my life policy but no doubt it will realise about £175 to £200. The jewellery is worth £200 and the silver service cost £75, worth about £25 to £30. I will not trouble you to sell the things, but by same mail I will write to Cosnett to ask him to do his best for me and hand you over proceeds of sale.*

If I should be successful in some of the things I have on hand I shall be able to purchase these things again, but as I have lost so considerably the last few years I cannot afford to have these things locked up owing you the amount I do.

The first-named defendant was called and deposed to his having been a personal friend of Hurley, and to his receiving a general power of attorney from Hurley after the policy and plate had been sent down to Cape Town.

This closed the evidence.

Mr. Rose-Innes, Q.C., for the plaintiff: The policy vested in the plaintiff on delivery. *Morkel* v. *Home* (2 Juta, 57). It never did vest in Mrs. Hurley's estate, as on her death there was a resulting trust in favour of her husband. Although if she had survived him she would have been entitled to the amount of the policy. *Re Adams* (23 C.D., 525); *Seyton* v. *Satterthwaite* (34 C.D., 511). The tacit hypothec of the minors does not exist, as Hurley had full powers under his wife's will to use and dispose of her estate for the benefit of the heirs, and any loss which has been sustained must fall upon them.

Mr. Schreiner, Q.C., for the heirs: The principles of the English law do not apply to this case. The policy formed part of Mrs. Hurley's estate, but whether it formed part of her estate or her husband's the minors' hypothec attaches.

There was no sale by Hurley to the plaintiff, and if the latter became insolvent her trustee could not claim the policy.

The case is a hard one, but the Court as upper guardian of the minors must protect their interests.

Judgment was given for the plaintiff.

The Acting Chief Justice said: The late Mr. and Mrs. Hurley were married without community of property. In 1887 Mrs. Hurley died, leaving four minor children, the issue of the marriage. Shortly after the death of Mrs. Hurley these children were taken charge of by the plaintiff at Hurley's request, the understanding being that he should pay £20 a month for

their board and lodging and all other necessary expenses to which she had been put. Hurley performed his promise up to September 1890. From that date his payments fell into arrear, and plaintiff's account up to March, 1894, amounted to £1,272 7s. 3d. Of this amount Hurley paid off £115, leaving a balance of £1,157 7s. 3d. still due. Hurley is said to have been in difficulties. Upon his wife's death her estate apparently was realised, and he took possession of the proceeds. As far as we can judge, this estate came to over £6,000, and Mrs. Hurley in her will and codicil expressly gave her husband the sole control and management of the whole property, exempting him at the same time from any liability to account to anybody, and vesting in him full power to use, apply, appropriate, and invest as he might think fit and proper and best the whole of her property, for the use and benefit of the children. He did so use and apply the property, and in August, 1893, he had, I won't say wasted, but at any rate disposed of the whole estate. At that time his debt to the plaintiff was running into a large amount, and he was very anxious indeed to pay what he owed. It is common cause that plaintiff is acting the part of a mother to these children, but so far as this case is concerned I prefer to look upon her as a simple creditor. In August, 1893, Hurley, wishing to pay her, sent down to her a box of silver and jewellery belonging to his late wife and a life policy effected on his own life in 1885. There is no doubt that this box of jewellery and silver were the property of Mrs. Hurley, and referring to the will and codicil there is no doubt also that Hurley had full power to dispose of these things as he chose. The life policy, it is contended, also belonged to Mrs. Hurley. My own opinion is that this life policy was never vested in Mrs. Hurley, and never formed part of her estate. It was issued by the company on his life for the sole use and benefit of his wife. Mr. Innes has quoted English cases and referred to the English Married Woman's Property Act of 1870, to show that if the wife had survived the husband the policy would have become her property. But he also quoted cases to show that where the wife predeceased the husband, the Married Woman's Property Act would not apply. A nice question would be raised as to whether under our law this policy would be vested in the wife or not. As at present advised I think it would not; but it is not necessary now to decide this question, as even if it was Mrs. Hurley's property Hurley had full power to dispose of the wife's estate as he liked. On the 16th August, wishing to pay the plaintiff something, he sent this property to her, so that she might have the benefit of the proceeds. Plaintiff, however, was much opposed to the sale of the jewellery, which she considered in the light of heirlooms, and Cosnett, who acted as her agent, advised her to keep the policy and not to part with it. Practically what took place was this: Hurley gave plaintiff full power to dispose of the property and pay the proceeds over to herself. Instead of selling the property and paying the proceeds over, the property itself was taken over to the creditor in reduction of her claim. I think the 8th paragraph of the declaration represents the facts with substantial accuracy. There is no doubt the policy was taken over, and the question arises whether the mere delivery of the policy was sufficient to transfer the policy to the plaintiff. I think after reference to the case of *Morkel* v. *Home* (2 Juta, 57), that there is distinct authority for holding that the delivery of the policy under the special circumstances was sufficient to vest the policy in the plaintiff. The property having come into plaintiff's possession she is entitled to apply it to the reduction of her claim. There is some force in the contention that the property was only pledged to the plaintiff, but assuming that the property was actually alienated to the plaintiff, which is, perhaps, the more correct view to take looking at this declaration, and also to the prayer, it really makes little difference to the actual issue. The proper judgment will be to grant plaintiff an order with costs in the terms of the declaration, to the effect that the property is vested in her, and that she is entitled to apply the value of the property in satisfaction of the debt due to her, subject to the pledges aforesaid, and subject to her accounting to the estate for any surplus that may be realised above her debt.

Mr. Justice Barry concurred. He said: I quite follow Mr. Schreiner's argument with reference to the claims of the minors in this matter, but he must see, nevertheless, that the intention of Hurley would clearly be defeated if the Court found itself compelled to give effect to his view. There can be no doubt that Hurley's intention was to pay his obligation to the plaintiff. Arguments have been addressed as to in whom this policy was vested at the time it was sent to the plaintiff. These arguments are very useful, because they give one information, but I do not think for the purposes of this case it is necessary for the Court to express any opinion on that subject. It is quite clear that Hurley meant to part with any property he could part with, and to divest himself, whether in his personal capacity or as executor, of every-

thing which he could divest himself of. That is why he sent these things to plaintiff, and his power of attorney to Cosnett. In my opinion there was a clear transfer of this property, and although at first I was rather inclined to the opinion that it was more in the nature of a pledge than of an absolute alienation, I think, when we consider what passed between the parties, Hurley never meant to get back this property. He meant to part with it absolutely, and I don't think if Hurley had ever attempted to sue the plaintiff for the property this Court would have held him entitled to recover. It was a complete alienation, more in the nature of a sale than anything else. I do not think the position can be better stated than has been done in the eighth paragraph of plaintiff's declaration, and the Court cannot do better than state its judgment in those terms. Plaintiff is willing to allow any surplus there may be to go to the children, and I think that it ought to go, though I am rather inclined to the opinion that there will be no surplus. I do not think the Court should allow the costs in this case to come from any other source than from this property.

Mr. Justice Upington: I have no hesitation in assenting to this judgment. I will even go to the length of saying that if Mr. Schreiner's contention were held to be correct and the money were then given to the children, and if an application were made to me as judge to repay the plaintiff out of the moneys so brought in for the benefit of the children what she had expended on clothing, food, and education for several years, I should order the amount to be repaid to her.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendants' Attorneys, Messrs. Fairbridge & Arderne.]

EDMUNDS AND OTHERS v. WELLINGTON MUNICIPALITY. { 1894. Sept. 4th.

Municipal Regulation—Beating drums or blowing instruments—*Intra vires*—Salvation Army.

The W. *Municipality constituted under Act 45 of 1882 passed the following municipal regulation*: No person or procession of persons shall at any time have the right to parade or proceed through the streets, screaming, shouting, yelling, beating drums or blowing instruments, without the consent first had and obtained from the Council or from some person duly authorised by them.

E. *and* others, *members of the Salvation Army*, were convicted *for contravening the above regulation, by marching in procession and playing their band through the streets of* W. *on Sunday the 19th August, 1894.*

Held, *on appeal, that the regulation was* intra vires *and that* E. *and* the others *had been rightly convicted.*

This was an appeal from the conviction of the appellants by the A.R.M. of Wellington.

The accused, members of the Salvation Army, were charged with contravening section 38 of the Municipal Regulations of Wellington, by marching in procession on Sunday, 19th August, 1894, through Church-street, beating drums and blowing musical instruments without the consent of the Municipality or some person authorised by them first had and obtained.

Regulation 38 is in the following terms:

No person or procession of persons shall at any time have the right to parade or proceed through the streets, screaming, shouting, yelling, beating drums or blowing instruments, without the consent first had and obtained from the Council or from some person duly authorised by them.

The Agent for the accused excepted to the summons on the following grounds:

That the regulation under which the prosecution is instituted, inasmuch as it does not even purport to deal with the abatement of nuisances, but to interfere with the rights and liberties of the ratepayer, is *ultra vires.*

The Court overruled the exception.

The accused pleaded "Not guilty."

It appeared from the evidence that verbal application was made to the secretary of the Municipality by the Captain of the local branch of the Salvation Army, on the 13th August, for leave from the 15th to 21st August for the Jubilee band of the Army to parade and play in the streets.

The Council sanctioned the marching and playing of the Army on all the days asked for except Sunday, and the Captain of the local branch was informed in writing of the Council's decision.

The Army disregarded the prohibition as to Sunday, on which day about five p.m. they marched and played their band (the best, according to one of the witnesses, that had visited Wellington for some time), and hence the present prosecution.

The Municipality of Wellington is constituted under Act 45 of 1882, and the regulations in question were framed under that Act.

At the trial, however the "Government Gazette" containing the proclamation of the

regulations was not put in, but the book of regulations was before the Court in the appeal.

The accused were found guilty and sentenced to pay a fine of 10s. each, or in default of payment to undergo fourteen days' imprisonment with hard labour.

From this sentence the present appeal was brought.

Mr. Schreiner, Q.C., in support of the appeal: No proof was given that the regulation in question was duly proclaimed. The Act requires that the regulations made under it should be proclaimed by the Governor. The only proof of such proclamation which the Act recognises is the production of a copy of the "Gazette" in which the bye-law is published.

There was nothing before the Court to show the violation of any law. No "Gazette" was put in, and no proof given that the regulations were ever proclaimed.

This is important, as it was held in *Queen* v. *Cass* (7 Juta, 324) that the regulations would not be infringed unless a nuisance had been committed.

The Court referred to *Railway Maintenance Department* v. *Hughes* (3 E.D.C., 295).

In that case the "Gazette" was before the Court on appeal, in the present case it is not.

Mr. Justice Upington: Can we not now send for the "Gazette."

The Court would not do so in a criminal appeal like the present.

On the merits this case is distinguishable from the *Queen* v. *De Rot* (7 Juta, 7).

It would clearly be incompetent for any Municipality under the Act of 1882 to provide that no one should drive a carriage through the streets without the consent of the Municipality: Clearly such a regulation would be *ultra vires*, and beyond the reasonable powers of the local body. So here, where the music was admittedly good, the regulation could not apply. There is nothing to show that anyone was even annoyed.

The regulation of processions does not extend "to regulating" to the extent of putting a stop to any performance of a band in a street.

He also referred to and discussed the following cases: *Queen* v. *Cass and Another* (7 Juta, 324) and *Queen* v. *Unsworth and Others* (7 Juta, 353),

Mr. Rose-Innes, Q.C., for the Municipality: The objection that there was no proof that the regulations had been proclaimed cannot be sustained, as the agent for the accused actually excepted to the summons on the ground that the regulation was *ultra vires*.

On the merits, *Clack's Case* (1 Sheil, 78) is directly in point.

[The Court intimated that it was unnecessary to continue the argument.]

The appeal was dismissed.

The Acting Chief Justice said: The general Municipal Act, No. 45 of 1882, no doubt gives Municipalities much wider powers than the old Ordinance gave them. The 109th section allows Municipalities to make their own bye-laws to regulate traffic. Under this bye-law the Wellington Municipality made the following bye-law: "No person or procession of persons shall at any time have the right to parade or proceed through the streets screaming, shouting, yelling, beating drums or instruments without the consent first obtained of the Council, or some person duly authorised by them." It is contended that this bye-law is *ultra vires*. In the case of the *Queen* v. *Clack* (1 Sheil, 78), objection was taken to a very similar bye-law under the same Act and the Chief Justice said in his opinion the regulation was entirely *intra vires*, and the Municipality had the power to provide that no procession should parade, and no band should play without the consent of the Municipality being first obtained. In this case the defendants who belong to what is called the Salvation Army—with whose good works I have great sympathy—held a Jubilee day at Wellington. Recognising this bye-law, they applied to the Municipality for permission to march through the streets. They got the permission asked for for every day except Sunday. I think the exception under the circumstances was a reasonable one to make and might gracefully have been acquiesced in, seeing that in all these cases the rights of other people have to be considered. I think the Magistrate was perfectly right in his decision that this bye-law was *intra vires*, and this Court, having no reason to depart from its previous decision, must hold this bye-law was properly made. The appeal will be dismissed with costs.

Mr. Justice Barry and Mr. Justice Upington concurred.

[Appellant's Attorney, Gus. Trollip; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

Ex parte ZONDAGH. } 1894.
Re ZONDAGH'S ESTATE. } Sept. 4th.

Derelict Lands Act, 1881 - Farm — Sale — Transfer deed.

In 1858 M. *sold to his son* G. *one-fourth of a farm.*

By the deed of transfer only one-eighth of the farm was conveyed to G., *the remaining one-eighth being registered in* M.'s *name.*

Thereafter M. *died and at the date of the application to the Court his estate was unrepresented,*

G. remained in possession of and occupied the one-fourth of the farm until his death in 1893.

Thereafter G.'s widow and executrix applied, under the Derelict Lands Act of 1881, to have the one-eighth of the farm, registered in M.'s name, transferred to her husband's estate.

The Court made no order, but suggested the appointment of an executor dative to M.'s estate.

This was the petition of Salmina Gertina Zondagh, widow, in her capacity as executrix of the late Gert Johannes Zondagh, who died in the year 1893.

Gert Johannes Zondagh was one of the sons of the late Matthys Petrus Zondagh, who died in the year 1872.

Before his death, in the year 1858, Matthys Petrus Zondagh sold all his landed property to his sons, four of whom took certain shares in certain properties in equal proportions, and the other one, Gert Johannes Zondagh, certain other shares alone.

After the death of Matthys Petrus Zondagh, his widow was appointed executrix, but she subsequently died, and one of the sons, George Frederick Zondagh, was appointed executor dative; he is also dead, and the estate is now entirely unrepresented.

There is only one son of the late Matthys Petrus Zondagh still living, namely Hilgard Martinus Zondagh.

Since the date of the sale Gert Johannes Zondagh has been in possession of a one-fourth share of the farm Duigas in the division of Uniondale, which he was believed to have purchased from his father.

On reference however to the deed of transfer from his late father to himself, dated 18th November, 1859, it appeared that only one-eighth share of the farm was transferred to him though at that time a one-fourth share was, by deed of transfer dated 2nd February, 1846, registered in the name of Matthys Petrus Zondagh.

The last-mentioned one-eighth share has since the date of the sale, the 11th June, 1858, been in the possession of and occupied by the late Gert Johannes Zondagh and his legal representatives, and has always been treated as his property.

The petitioner was desirous on behalf of her husband's estate of obtaining transfer of the said one-eighth share so occupied as above set forth.

The prayer was for an order, under the Titles Registration and Derelict Lands Act, 1881, directing the Registrar of Deeds to enregister the one-eighth share of the farm Duigas, standing registered in the name of the late Matthys Petrus Zondagh, by deed of transfer dated 2nd February, 1846, as the property of the late Gert Johannes Zondagh.

Other affidavits, in addition to the petitioner's, were filed showing that Gert Johannes Zondagh had been in possession and occupied the one-eighth share of the farm in question for upwards of thirty-five years.

Mr. Molteno was heard in support of the application and relied on Act 28 of 1881, section 2.

The Court made no order, but intimated that application might be made for the appointment of an executor dative in the estate of Matthys Petrus Zondagh, and that he could act as best advised.

[Petitioner's Attorneys, Messrs. Tredgold, McIntyre & Bisset.

SUPREME COURT.

[Before Mr. Justice BUCHANAN (Acting Chief Justice.]

PROVISIONAL ROLL.

VERMAAK'S EXECUTORS v. VERMAAK. { 1894. Sept. 12th.

Perpetual silence — Action—Bar — Will—Legatees.

Where legatees had lodged an objection to a liquidation account, and publicly pretended that they had an action against the executors for amendment of the account, but had allowed four months to elapse without taking any further proceedings, the Court, on the application of the executors, ordered the legatees to bring their action within six weeks, failing which, to show cause why they should not be barred by a decree of perpetual silence.

In this case the defendants were summoned to show cause why they should not be ordered, within six weeks after the return day of the summons, or within such other period as the Court might appoint, to institute an action

against the plaintiffs, which, as the summons alleged, the defendants give out and publicly pretend to have against the plaintiffs for the amendment of the first and final liquidation and distribution account in the estate of the late Martha Maria Vermaak, on account of the executors bringing up an amount as due by the estate of the late T. D. Vermaak, the father of the defendants, which sum the defendants deny to be due, and which alleged or pretended action the defendants have hitherto failed and neglected to bring.

The defendants were also summoned to show cause why, on their failure to bring their alleged or pretended action within due time mentioned, they should not have a decree of perpetual silence imposed upon them in respect thereof, and they be for ever barred from bringing the same, and to show cause, lastly, why they should not pay the costs of this application.

The facts are these: By the will of the late Martha Maria Vermaak, her children by her late husband (J. A. Vermaak) were appointed her sole and universal heirs, the descendants of those of her children who predeceased her succeeding to the shares of such predeceased children, according to the laws of succession. The will further reads: "It being, however, my express will and desire that all sums of money or other debts due and owing by any of my said children or their descendants shall be paid by them into my general estate."

The plaintiffs, in preparing an account of their administration and distribution of the said estate, credited the estate of the deceased with a debt alleged to be due to the deceased by the late T. D. Vermaak, the defendants' father, and the distribution to the defendants was accordingly diminished. On the 27th April last the plaintiffs published a notice in the "Gazette" stating that the first and final liquidation and distribution account in the estate of the late Martha Maria Vermaak (born Muller), of Uitenhage, would be open for inspection of all concerned at the Resident Magistrate's office, Uitenhage, and at the office of Mr. Attorney Schweizer, Burghersdorp, for a period of seven days from the 10th May, 1894, after which, should no objection be raised, the same would be considered as approved and acted upon accordingly.

The defendants objected to the account on the grounds that they denied that "there was any sum due to the said estate by their late father."

They have not, however, prosecuted their objection to the account, nor taken any further steps to have it amended.

The Master has sued the plaintiffs to file an account in terms of the law, but the plaintiffs alleged that they were unable to complete the account in consequence of the objection, which rendered it impossible to pay out the heirs, obtain vouchers, and complete the account to the satisfaction of the Master.

Mr. Rose-Innes, Q.C., was heard in support of the application and relied on *Campbell* v. *Douglas* (1 Searle, 48).

There was no appearance for the defendants.

The Court granted the application, and ordered the defendants to commence proceedings within six weeks from the date of service of the order, failing which, to show cause on 8th November why they should not be barred by a decree of perpetual silence.

[Plaintiffs' Attorneys, Messrs. Fairbridge & Arderne.]

MORRIS V. PIPPIN.

Mr. Molteno asked that provisional order against defendant might be discharged.

Granted.

JOOSTE V. KEYTER.

Mr. Tredgold asked for a final adjudication of defendant's estate.

Granted.

GRAHAM'S EXECUTORS V. BESTER.

Mr. Spencer applied for provisional sentence on a mortgage bond for £1,700, with interest from 1st January, 1894.

Granted.

MCLEOD V. MEYERS.

Mr. Buchanan moved for judgment for £63 8s.

Granted.

ALFORD, WILLS AND CO. V. DANIELS.

Mr. Duxbury moved for judgment for £56 8s. 1d.

Granted.

CURTIS V. RUNGE.

Mr. Maskew moved for judgment for £161 10s. 4d., with costs.

Granted.

REHABILITATIONS.

On motion from the Bar, the following insolvents were granted their rehabilitations: Gerrit Hendrik Moller, Charles Goodyear, and Alexander Floris Kriel.

GENERAL MOTIONS.

MYBURGH'S EXECUTORS v. BLANCKENBERG'S EXECUTOR.

Mr. Rose-Innes, Q.C., applied for leave to the defendant to purge his default, and to file his plea in the suit between the parties.

Mr. Searle, Q.C., appeared for the plaintiffs.

An order was made by consent for the appointment of Mr. Webber as arbitrator, with Mr. Watermeyer to assist him as surveyor, to decide between the parties on the basis of the pleadings.

Ex parte HOLST. { 1894. Sept. 12th.

This was the petition of Florentina Holst in her capacity as executrix testamentary of her late husband Peter Holst, otherwise Peter Pietersen Holst.

The petitioner and her husband, who died in November, 1888, were married in community.

By their mutual will petitioner was appointed her husband's sole executrix and administratrix of his estate and guardian of their minor children, and he also appointed her a joint heir with the children, giving her moreover possession of the estate for life.

On the 13th October, 1890, the Court granted the petitioner leave to mortgage the landed property in the estate for £250 for the purpose of paying her liabilities, and for the future maintenance of herself and her children,

On the 21st August, 1892, she again obtained leave to raise a loan of £115 in order to effect certain repairs to the buildings, which had been damaged by severe weather.

The petitioner now alleged that she had incurred a fresh liability of £150 in making certain additions and improvements to the buildings, which were increased in value by more than that amount, and that she had no funds belonging to herself or the estate available to pay the sums expended.

The petitioner, who had waived her rights under the will and by her marriage in community, now prayed for authority to raise a loan of £150 on mortgage of the property to pay for the expenditure incurred, and also such further sum as should be necessary to cover the costs of the present application and of passing the necessary bond.

There was evidence before the Court that £150 had been spent in the additions and improvements, and that the property had been enhanced in value by at least £175.

The matter was referred to the Master, and he reported in favour of the application.

Mr. Sheil appeared for the petitioner.

The Court authorised the petitioner to raise a loan of £160 on mortgage, accounts supported by vouchers to be rendered to the Master.

[Petitioner's Attorneys, Messrs. J. & H. Reid & Nephew.]

Re THE UNION BANK. { 1894. Sept. 12th.

Mr. Schreiner appeared to present the fifth report of the official liquidators, which was as follows:

The official liquidators beg to submit to this honourable Court their fifth report. Since filing their last report, the sum awarded to creditors and remaining unclaimed has been reduced from £1,024 1s. 8d. to £120 19s. The various small unclaimed balances already reported and amounting to £540 7s. 3d. have been duly written off and the relative accounts adjusted. In terms of the order granted by your honourable Court, the liquidators have from time to time made refunds to the contributories who have paid in full, and amounting in all at 31st July last to £21 per share on 1,318 shares. A further payment of £1 per share has since been made, and your liquidators trust, provided no unforeseen circumstances occur, to be able eventually to justify their original estimate of refunding £30 to £35 per share in all. By far the greater portion of the funds for this purpose will be derived from payments to be received from those debtors and contributories who have agreed, with the sanction of the Court, to liquidate their engagements by periodical payments. The liquidators annex hereto a further account showing in tabulated form the receipts and payments to 31st July, 1894. The account has been further amplified by showing in separate columns the receipts and payments for the period covered by the accounts previously filed, with a view of enabling your honourable Court to ascertain the progress of the liquidation without the necessity of further reference. The list of contributories who have paid their calls in full, as confirmed by your honourable Court, represented 1,318 shares, and acting on the authority already granted, the liquidators have added thereto the names of the following who have since discharged their obligations, namely: Miss Emilie Helene Fock, two shares; Gerrit Albertus Buysses, three shares, making the total of 1,318 shares on which refunds had been paid as above stated. It will be seen that the liquidators have kept the expenses of liquidation within the same economical limits as before. When our last report was presented to your honourable Court

our attention was directed to the case of one Henry Smith, who was for many years messenger to the bank. This man was formerly a shareholder, but some years before the institution failed he seems to have made arrangements with the directors under which he paid a certain sum in cash, and his shares were declared forfeited. No payments have been made to the liquidators by him, nor does his name appear on the list of contributories. It appears he was desirous that a bonus of £100 should be given him from the assets of the bank to pay off a mortgage on a house he owns, and which is bonded to one of the liquidators, and it was stated that certain of the contributories, though not a majority of the shares represented, had agreed to this. It has also been suggested that an allowance of £1 per month should be made to Mr. Smith, but your liquidators, though they have no reason to doubt that the applicant rendered long and faithful services to the bank, fail to see on what ground they can recommend your honourable Court to grant the order sought for. We have, however, put the facts of the case before your honourable Court, as our attention was specially directed to the matter.

Dated at Cape Town this 6th day of September, 1894.

G. W. STEYTLER,
Secretary Colonial Orphan Chamber and Trust Company;
HY. GIBSON,
Secretary South African Association;
Official liquidators.

Annexed to the report was the third account rendered by the official liquidators, showing the result of their transactions for the twelve months ended 31st July, 1894, and giving the total receipts and expenditure up to that date. The totals under the several headings are as follows:

RECEIPTS.

To cash	£54.705
Assets collected	282,014
Calls collected	445,180
Amounts received in trust	11,650
Collections account, Standard Bank ...	156,159
Damages recovered from C. J. Vos ...	4,710
Unclaimed balances	540
Earnings in liquidation	5,269
	£960,229

EXPENDITURE.

By Cape of Good Hope Bank	£314
Amounts set off	10,731
Amounts received in trust	11,638
Standard Bank, secured account ...	201,458
Dividends paid	663,091
Interest paid to depositors	30,208
Refund to shareholders on 1,818 shares at £21	27,678
Costs in liquidation	13,073
Payments to protect securities	1,082
Interest in liquidation	45
Petty cash on hand	957
	£960,229

The Court granted the usual order. Publication to be made in the "Cape Times," "Cape Argus," and "Ons Land."

MOORE V. MOORE.

Mr. Searle asked for direction of the Court as to the mode of service to be adopted of the citation in the suit instituted by applicant against her husband for a judicial separation and for other purposes.

The Court made an order for personal service on the defendant, the citation to be returnable on October 12.

IN THE ESTATE OF THE LATE WM. J. HAWKIN.

Mr. Tredgold asked for authority to the Registrar of Deeds to allow the transfer to be passed to the executor of the said estate of certain individual half-share of landed property situated in Graham's Town, taken over by him at a valuation from his brother's estate, he being the owner of the other half-share.

No order was made, and the application was ordered to stand over, in order that the property might be properly valued and for the Master's report.

COLONIAL GOVERNMENT V. HEPWORTH.

Mr. Rose-Innes, Q.C., with whom was Mr. Tredgold, applied on behalf of the defendant for leave to appeal to Her Majesty in her Privy Council from the judgment of this Court in the suit between the parties brought on by way of a special case.

Mr. Schreiner, Q.C., with whom was Mr. Giddy, offered no objection, and leave was granted on the usual terms.

KLAIBER V. KLAIBER.

On the motion of Mr. Buchanan, the return day was extended to November 14.

REGINA V. KUKKUK. } 1894. Sept. 12th.

Vagrancy—Wandering—Act 23 of 1879, section 4—Act 27 of 1889, section 2—Presumption—Failure to rebut.

Where K. *had been convicted of wrongfully and unlawfully wandering over a farm*

without the permission of the owner, and the Magistrate who convicted found as a fact that K. *was wandering about the farm for the purpose of stealing honey, and that consequently the presumption raised by section 4 of Act 23 of 1879 had not been rebutted, the Court on appeal refused to set aside the conviction.*

This was an appeal from the conviction of the appellant by the Assistant Resident Magistrate of Willowmore, sitting at Steytlerville.

The accused was charged with the crime of contravening section 4, Act 23 of 1879, as amended by section 2, Act 27 of 1889, in that upon or about the 12th day of August, 1894, and at or near Brakpoort, the accused did wrongfully and unlawfully wander over the farm Brakpoort in the district of Uitenhage without the permission of the owner.

The accused pleaded not guilty, and admitted through his attorney that he was on the farm, but denied that he committed an act of vagrancy.

It appeared from the evidence that the accused, who is a mason and lives on his own erf at Steytlerville, went on Saturday, 11th August, at the invitation of one Erasmus to the latter's farm to take out honey from bees' nests

He left Erasmus's farm on the following morning about 10 o'clock rather drunk, as he alleged in his evidence, and feeling sleepy he off-saddled on the farm on which the alleged offence was committed and went to sleep, and when he awoke he found that his horses had strayed.

He then followed the spoor of the horses, overtook them, laid down again, eventually left the farm.

There was evidence however to show that the accused was seen in a very remote and wooded part of the farm a very considerable distance from the main road.

The Magistrate found as a fact and stated in his reasons that the accused was wandering about the farm for the purpose of stealing honey, and that consequently the presumption raised by section 4 of the Act had not been rebutted.

It was contended for the accused in the Court below that he did not commit such an offence as was contemplated by Act 23 of 1879 as amended by Act 27 of 1889, but that if there was any cause of action it should either have been a civil one for trespass or under the Bee Act of 1869. Further, that as he was not summarily arrested at the time, as provided by section 5 of Act 23 of 1879. he could not be subsequently summoned as was done in the present case. In support of these contentions the prisoner relied on *R.* v. *Jones* (9 Juta, 210); *R.* v. *Cupido* (Buch., 79, p. 214); Act 23 of 1879, section 5; Act 9 of 1869, section 3.

The accused was found guilty and sentenced to pay a fine of £2, or in default to be imprisoned with hard labour for one month.

From this sentence the present appeal was brought.

Mr. Benjamin was heard in support of the appeal. He contended that the accused could not possibly be said to be a vagrant in terms of the Act. Nor could he be regarded as a wanderer (*Vide* definition of wanderer, "Imperial Dictionary)." As to what is vagrancy, loitering and wandering by English Law, see *Painton and Others* v. *Hill* (15 Cox, 461) and *Clark* v. *The Queen* (15 Cox, 666). He also referred to and discussed *Regina* v. *Jones* (9 Juta, 210) and *Regina* v. *Tamplin and Others* (4 H.C.R., 241), and urged that if any offence had been committed proceedings should have been taken either under Act 27 of 1882, section 12, or Act 9 of 1869, sections 2 and 3, but that no offence had been committed under the Vagrancy Acts.

The Attorney-General for the Crown was not called on.

The Court dismissed the appeal.

The Acting Chief Justice, in delivering judgment, said: The crime of which the prisoner was accused in this case is under the 4th section of the Vagrancy Act as amended by the Act of 1889. This section was construed and explained as clearly as it could be explained in the case of the *Queen* v. *Jones*, to which Mr. Benjamin has referred. A mere trespasser on a farm, however wrongful his purpose may be, does not come under this Act, as explained in that judgment, but where a person wanders over a farm without permission there is a presumption that he is an idle and disorderly person, and this presumption it is incumbent on him to rebut. Where, as in this case, there is strong suspicion, if not actual evidence, that the man was wandering over the farm as a prelude to stealing, and he was discovered in a secluded part of the farm, far away from the main road, I think there was ample evidence before the Magistrate to justify him in convicting the prisoner. This is a case where the accused has not rebutted the presumption which the law throws upon him. Mr. Benjamin has argued the case very fairly and ably, but as the facts and evidence justify the Magistrate's finding, it would not be proper for this Court now to quash the conviction. The appeal will be dismissed.

[Appellant's Attorneys, Messrs, Scanlen & Syfret.]

REGINA V. TOBIAS. { 1894. Sept. 12th.

Theft—Mules—Conditional sale.

L. *sold two mules to* T. *subject to the condition that they were to remain* L.'s *property until the last instalment of the purchase price had been paid.*

Before the first instalment had been paid T. *bartered the mules for other property.*

Held, *on appeal, that* T. *had been rightly convicted of the theft of the mules.*

This case, which came on review from a sentence passed upon the prisoner by the Resident Magistrate of Wynberg, was, at the request of the Court, argued on behalf of the prisoner.

Tobias was charged with the theft of two mules, found guilty, and sentenced to three months' hard labour.

The facts are briefly these: The accused bought two mules for £30 from one Lategan, under a written agreement to which he made his mark, that they should remain the seller's property until the last instalment of the purchase price had been paid.

Before the first payment was made, Tobias bartered the mules for other property, and in consequence criminal proceedings were instituted.

The prisoner, who can neither read nor write, gave evidence and swore that that part of the agreement which stated that the mules were to remain Lategan's property until the last payment had been made was not read over to him when he entered into the contract.

Mr. Buchanan appeared for the prisoner and contended that there was an entire absence of *mens rea*, and that the dealing with the mules by the accused was not fraudulent, but *bona fide* under a misapprehension of his legal rights.

The Attorney-General, for the Crown, was not called on.

The conviction was sustained.

The Acting Chief Justice said: There is no doubt in this case. It is very fairly admitted that these mules were sold subject to a suspensive, not a resolutive condition, and consequently the property in them never did pass to Tobias. The question is, did Tobias know that the property had not thus passed? On the evidence the Magistrate found that he knew the property had not passed to him, and notwithstanding that, he sold the property. Under these circumstances the Magistrate was justified in arriving at the decision which he did. It is true that a number of circumstances have been put forward to-day which might have been very properly urged upon the Magistrate, and upon which the Magistrate might even upon the evidence have acquitted the prisoner. But I must take it that on the evidence the Magistrate found that there was *mens rea* in connection with the dealing in this property against the will of the owner. The appeal must be dismissed and the conviction sustained; at the same time, I should like, under the circumstances, to draw the attention of the Attorney-General to the matter, with a view to his considering whether this is not a case in which the clemency of the Crown might be properly exercised.

The Attorney-General intimated that his lordship's suggestion would be considered.

SUPREME COURT.

(IN CHAMBERS).

[Before Mr. Justice BUCHANAN (Acting Chief Justice.]

Re THE MINOR VERWEY. { 1894. Sept. 18th.

Mr. Buchanan moved for authority to the Master to pay out from money to the minor's credit in the Guardians' Fund, being his paternal inheritance, an allowance for the purpose of providing for his education.

The Master reported in favour of an allowance of £30 per year for three years.

The order was granted in terms of the Master's report.

IN THE ESTATE OF THE LATE MICHAEL A. SCHMIDT.

Mr. Buchanan applied for authority to the widow of the said Michael A. Schmidt to take over the movable property of her late husband's estate, on condition that she pays off certain mortgage bond on the land and costs of transfer at a valuation, and be allowed to retain and carry on the hotel business for the benefit of herself and the minor heirs.

The order was granted.

SIEBERT V. SIEBERT.

Mr. Graham asked for an order removing the suit instituted by the plaintiff against her

husband, the defendant, for the restitution of conjugal rights, failing which for divorce, from this Court to the Circuit Court at Mossel Bay for trial on the 28th inst.

The Court granted the application, notice to be given to the defendant, and costs to be costs in the cause.

BURNS V. THE TOWN COUNCIL.

Mr. Graham applied, on behalf of petitioner, for leave to sue *in forma pauperis* in an action about to be instituted against the Town Council of Cape Town for damages sustained, and an amount due for work performed in connection with a contract for the erection of a certain engine-house.

It was stated that the plaintiff's total claim amounts to £2,500.

The Acting Chief Justice, in referring the matter to counsel, expressed the hope that in all these cases counsel would convince themselves as to the absolute poverty of clients before certifying.

REGINA V. BURKE. { 1894. Sept. 18th.

This case was set down for argument on the conviction of the prisoner, who was charged before the Resident Magistrate of Namaqualand with contravening the Prisons Act of 1888 by attempting to make his escape, or conspiring with another prisoner to make his escape, from the Springbokfontein Gaol.

Mr. Giddy, for the Crown, said that the Attorney-General had come to the conclusion that there were no grounds for supporting the conviction.

The Acting Chief Justice said: In this case two prisoners were charged under section 28 of Act 23, 1888, in that they did wrongfully and unlawfully endeavour to make their escape, or conspire with one another to make their escape from gaol. One was found guilty, the other not guilty. All that took place was that the prisoner found guilty said to the other that he was going to ask the doctor to remove him to the Breakwater-station, Cape Town, and if he refused he should endeavour to make his escape while gathering wood on the mountain. He asked the other man to escape with him as soon as the opportunity offered itself. The other refused, saying that he would serve out his time. There was no attempt at escape, no conspiracy, no confederation, and really no evidence on which the conviction could be sustained. The conviction must accordingly be quashed.

SUPREME COURT.

(IN CHAMBERS).

[Before Mr. Justice BUCHANAN, Acting Chief Justice.]

SYFRET AND ANOTHER V. VAN DYK. { 1894. Sept. 25th.

Mr. Molteno applied for the attachment *ad fundandam jurisdictionem* of this Court of certain piece of perpetual quitrent ground known as farm No. 56, in the district of Barkly West, in an action about to be instituted by edictal citation against the said respondent for recovery of the amount of a mortgage bond.

The application was granted; one publication in the "Bechuanaland News" and in the "Gazette."

IN THE ESTATE OF THE LATE PETRUS J. RAUTENBACH.

Mr. Buchanan applied for authority to the executors testamentary to sell certain defined portion of the farm Cypherfontein, the property of the said estate, in the district of Uitenhage, to one of the said executors, for the purpose of paying a debt due to him in respect of his settlement of the amounts owing by the joint estate of the said Rautenbach and surviving spouse.

The Court granted a rule *nisi*; one publication in "Uitenhage Times" only.

COLONIAL GOVERNMENT V. OPPERMAN.

Mr. Buchanan asked for the attachment *ad fundandam jurisdictionem* of this Court of certain farms known as Raszyus, Puts Noord and Verdooest Kolk, situate in the district of Kenhardt, in an action about to be instituted by edictal citation for the recovery of the balance of purchase price due thereon by the said respondent.

The order was granted, personal service, if possible; in the alternative, one publication in the "Bechuanaland News" and in the "Gazette."

The defendant was supposed to be in the region of Lake Ngami.

BELL V. FRASER AND CO.

Mr. Buchanan asked for leave to attach certain one-quarter share of the Fairview Coal-mine at Molteno, belonging to defendants, pending an action for the recovery of £17 19s. 6d., for professional services rendered.

The order was granted, on the understanding that it should not stop the working of the mine or the sale of coal.

REGINA V. PICQUEER. { 1894. Sept. 25th.

In this case the prisoner was charged with contravening Act 18 of 1873, section 2, sub-section 2, in absenting himself from his master's service without leave.

It appeared from the evidence that an arrangement was made between the accused and his master by which the former was to receive 6d. a day until harvest time, when his pay was to be 2s. a day, having also the right to cultivate certain ground for his own use. Without any intimation whatever to his master, he left his service on the 14th of the present month. The accused was charged before the Magistrate, found guilty, and sentenced to pay a fine of £1. The matter came on review before the Acting Chief Justice, and was by him referred to the Attorney-General for consideration.

Mr. Giddy now appeared in support of the conviction, which was sustained.

REGINA V. CLICKMAN. { 1894. Sept. 25th.

This case also came on review from a sentence of three months' hard labour passed on the prisoner by the Resident Magistrate of the Paarl, and had likewise been referred to the Attorney-General.

The prisoner was charged with contravening section 28 of Act 23 of 1888, in that he did conspire and confederate with one Richard Cornwall and Adriaan van Kesteren, then prisoners in the gaol at the Paarl under sentence of hard labour, to make the escape of both or either of them. It appeared from the evidence of Cornwall (he and Clickman being confined in the same cell) that Clickman at different times suggested various plans for making their escape, one being to cut through or loosen the iron window bars, and escape by the roof, another being to fall upon the gaoler, overpower him, and thus effect their escape. Clickman, however, took no active measures to carry out any of his plans further than asking Cornwall, who was employed as cook in the gaol, for an old knife or spoon, and Van Kesteren for a file, and according to what he told Cornwall, attempting to induce some of the untried prisoners to assist in overcoming the gaoler. The different plans, as communicated to Cornwall, were by him reported to the gaoler.

Mr. Giddy now appeared in support of the conviction, and while admitting that there had been no overt act, contended that the language of the 28th section was wide enough to justify the conviction in the present case. He cited and distinguished *Regina* v. *Kaplan* (3 Sheil, 264) and *Regina* v. *Töpken and Skelly* (1 App-Cas., 471).

The Court quashed the conviction.

The Acting Chief Justice said: The conviction in this case must be quashed. The only evidence against the prisoner is that of accomplices who speak only of conversations with the accused; and there is no evidence whatever of any overt act on the part of the accused to put his plans for escape into execution. To convict in such a case would place every prisoner at the mercy of any other prisoner who with a view of ingratiating himself with the authorities might concoct a story. This case shows the importance of keeping prisoners in separate cells, and will, no doubt, put officials on their guard in future.

DIGEST OF CASES.

PAGE

Adultery — Connivance — Divorce — Partnership—Dissolution.

R. *suspecting that her husband had been unfaithful to her, instructed her attorneys to employ a private detective to watch his movements.*

The attorneys employed a detective and gave him instructions to watch and report if R.'s *husband went to a house of ill-fame.*

The detective exceeded his instructions and prompted a prostitute whom he knew to accost R.'s *husband. The prostitute did so and* R.'s *husband committed adultery with her.*

Held, *in an action for divorce instituted by* R. *against her husband, that the conduct of the detective did not amount to connivance on the part of* R.

A partnership to carry on a hotel business existing between R. *and her husband dissolved by order of Court on a decree of divorce being granted.*

Robinson v. Robinson 243

Animal diseases—Glanders—Act 27 of 1893, section 9 — Field-cornet — Obstruction —Landowners — Divisional Council—List—Government approval—Publication in *Gazette.*

B., *the Field-cornet of Port Elizabeth, having received information that one of* R.'s *horses was suffering from glanders, went to* R.'s *house accompanied by two landowners whose names appeared on the list recommended by the Divisional Council in terms of section 9 of Act 27 of 1893, but the list had not been approved of by Government, nor had it been published by notice in the Gazette.*

R. *refused to admit them on his premises.*

PAGE

R. *was summoned in the Resident Magistrate's Court for obstructing* B. *in the execution of his duty, under section 9 of the Act, and fined £25.*

Held on appeal, *that as* B. *had not been accompanied by two qualified landowners within the meaning of the section* R. *had committed no offence in refusing* B. *admittance.*

Conviction accordingly quashed.

Regina v. Reed 219

Ante-nuptial Contract—Bond—Erroneous instruction to Notary — Non-registration — Act 21 of 1875, section 7.

M. *before his marriage instructed a Notary to draw up an ante-nuptial contract.*

M. *purported in the contract to settle a bond for £1,800 on his intended wife. After the execution of the contract, and* M.'s *marriage, the Notary discovered that an erroneous description of the bond had been given, and before he could receive fresh instructions from* M., *who really wished to bring two bonds amounting to £1,930 into settlement, the period within which ante-nuptial contracts must be registered under Act 21 of 1875, Section 7, had expired, and the contract was not registered.*

The Court, on an application for relief, allowed an amended contract containing a correct description of the bonds to be registered.

Ex parte Malan. — *Re* Malan's and Fourie's Ante-Nuptial Contract ... 205

Assault—Damages—Provocation.

Where in an action in a Magistrate's Court, for £20 damages for assault, the Magistrate found that the assault had been provoked by the plaintiff's own conduct, and granted absolution

PAGE

from the instance on the claim for damages. The Court, on appeal, upheld the Magistrate's decision.

Phillips v. Goddard 213

Attorney—Admission—Act 27 of 1883, section 14.

L., *who had served articles of clerkship for five years with a solicitor in England, and passed the solicitors' intermediate examination, but failed in the final, on the 12th January, 1892, applied to be admitted as an attorney of the Supreme Court.*

L. *was ordered to serve for another year in the Colony, and at the expiration of that period, without having passed any examinations, applied to be admitted as an attorney and notary.*

The Court refused the application, holding that L. *could not be admitted until he had complied with the 14th section of Act 27 of 1883.*

Ex parte Lee 295

Benefit Society—Arbitration—Pleadings.

One of the rules of a Benefit Society provided that: Should any question arise which cannot be decided by a reference to these rules, it shall be left to the decision of the Arbitration Committee of members to be elected at the general election of officers; and any member acting contrary to the decision of the arbitrators shall be fined 1s.

In an action brought in a Magistrate's Court by a member of the society against the trustees for sick pay and sick visitor's pay, the defendants did not specifically plead the rule as to arbitration, nor did they except to the Magistrate's jurisdiction, but defended the case on the merits.

Judgment was given in favour of the plaintiff.

Held on appeal, *from the Magistrate's judgment, that inasmuch as the rule as to arbitration was not pleaded or relied upon in the Court below it could not be relied upon in the appellate Court as a bar to the action.*

PAGE

Independent Companions Society v. Stemmet 228

Bond—Cancellation.

Where for thirty years no interest had been paid on a bond, and there was strong presumption that the amount of the bond had been paid, the Court granted a rule calling upon all persons interested to show cause why the entry in the Debt Register should not be cancelled.

Ex parte Herman.—*Re* Krul's Estate ... 239

Building Contract — Extras— Damages —Action—Gladstone v. Stableford 297

Bye-law—Village Management Board—Act 29 of 1881—Tax—*Ultra vires. Section* 19 *of Act* 29 *of* 1881 *provides*, inter alia, *that* it shall and may be lawful for every Board of Management to provide for the management and protection of all common pasture lands and the preservation of all vegetation thereon, and the fixing of the number and description of live-stock any inhabitant shall be allowed to keep and depasture thereon or on any part thereof; or to provide for the granting of temporary grazing rights over the said lands to travellers or carriers or other persons frequenting or passing through the said locality, and for the payment of reasonable dues in consideration thereof.

The Village Management Board of W., *wishing to defray the expenses of fencing the commonage from a neighbouring native location, passed a bye-law imposing a tax of 3d. per head per month on all cattle allowed to graze on the commonage and belonging to persons entitled to graze cattle on the commonage.*

L., *an erfholder in the village and entitled to run cattle on the commonage, having refused to pay the tax in*

PAGE

respect of certain cattle belonging to him, was summoned in the Magistrate's Court for the amount of the tax, and judgment was given against him.

Held on appeal, *reversing the Magistrate's decision, that the tax could not be imposed, the bye-law being* ultra vires.

Barling v The Town Council of Cape Town (Buch. 1875, p. 101) and Prince Albert Board of Management v Jooste and Others (4 Juta, 400) *distinguished.*

Langfield v. Whittlesea Village Management Board 231

Child—Custody.

B., *a resident of Cape Town, sued his wife for divorce on the grounds of her adultery with* F., *and prayed for the custody of the child of the marriage.*

A decree was granted but the custody of the child was given to the defendant's mother, as B. *stated in his evidence that he proposed to send it to Kimberley.*

Subsequent to the divorce proceedings F. *married the defendant, and after the marriage they continued to live at the house of the defendant's mother. The Court, on this fact being brought to its notice, and on being satisfied that* B. *had made ample provision for the care of his child, and on his undertaking to keep it in Cape Town, where the mother could have access to it, took the custody of the child from the defendant's mother and gave it to* B.

Budd v. Yeomans and Budd 250

Contract—Breach—Soda-water pump.

In May, 1893, the H. Co. *instructed* G. *to supply them with a pump to be used in the manufacture of soda water.*

G. *supplied the pump at a cost of £18 18s. 7d., but it did not give satisfaction.*

PAGE

In September, 1893, the price of the pump not having been paid, G. *approached the* H. Co. *and offered to take back the pump.*

The H. Co. *declined this offer, but entered into an agreement of settlement which provided that* G. *should repair the pump and keep it in good order for one year free of charge, the* Co. *undertaking to pay the price on one* M. *certifying that the pump produced good commercial soda water.*

In October, 1893, the H. Co. *paid* G. *£10 on account, and in January, 1894,* M. *certified that it was not the fault of the pump if the soda water were not good and that he considered that* G. *should be paid.*

In an action brought by G. *against the* H. Co. *for £13 7s. 9d., £8 8s. 7d. being the balance due on the pump, and £4 19s. 2d. being for work and labour done, the defendants pleaded that the pump had been tendered to the plaintiff, and claimed £20 in reconvention, £10 being the amount paid on account of the pump, and which they contended should be refunded, and £10 damages for breach of contract in not keeping the pump in repair.*

The Magistrate found as a fact that G. *had not fully carried out his undertaking to keep the pump in repair and consequently gave absolution from the instance on the claim for £8 8s. 7d., and judgment for £4 19s. 2d., with costs. He dismissed the claim in reconvention.*

An appeal from this judgment was dismissed, but that part of it having reference to the claim in reconvention was altered to absolution.

Hope Aerated Water Company v. Gibbs 261

2. —— Breach — Damages — Lyons v. Jewish Public School 258

Cost—Taxation—Review.

M. *applied to the Licensing Court of Albert for a new licence to carry*

PAGE

on the business of a bottle store in the Municipality of Molteno, and lodged a memorial in terms of Act 25 of 1891, *section* 13, *sub-section* 1.

The memorial did not contain the signatures of a majority of voters registered in the Municipality for the election of members of the Divisional Council.

The Licensing Court acting bona fide *granted the licence, but on an application made to the Supreme Court by* G. *the proceedings were set aside as being illegal and costs were given against* M.

In the taxation of costs, certain charges for serving a copy of the notice of motion and affidavits on the Chairman and each member of the Licensing Court, including three members who had voted against granting the licence to M., *were allowed.*

The Court on review of this taxation refused to interfere with the Taxing Officer's discretion.

Manley v. Gibson and Morgan 217

2. ——New point raised on appeal—Appropriation of payments.

Costs refused where on appeal the amount of a judgment in the Resident Magistrate's Court was reduced by 11s. 7d. *owing to the appellants succeeding on the question of appropriation of payments, that question not having been pleaded or raised in the lower Court; the defence in the Magistrate's Court being one founded on fraud, on which defence appellant failed.*

Paulse and Roelof v. Theunissen ... 236

Criminal prosecution—Close of case—Evidence—Admissibility—Review.

Du P. *and* B., *two Europeans, were, together with three coloured men, charged with the crime of malicious injury to property before the Resident Magistrate of Worcester.*

PAGE

An agent conducted the prosecution, and up to the time the case for the Crown and the defence had closed, no evidence whatever was adduced against Du P. *and* B.

The three coloured men were found guilty and sentenced, and, after an adjournment of the Court, were called to give evidence against Du P. *and* B.

The attorney for Du P. *and* B. *objected to the evidence as the case for the Crown and for the defence had closed.*

The Magistrate overruled the objection, received the evidence, and convicted Du P. *and* B.

Held on review, *by a majority of the Court* (Barry, J.P., E.D.C., *dissenting*), *that the evidence was inadmissible, and that* Du P. *and* B. *had been wrongly convicted.*

Regina v. Du Preez and Badenhorst ... 252

Derelict Lands Act, 1881 Farm—Sale—Transfer deed.

In 1858 M. *sold to his son* G. *one-fourth of a farm.*

By the deed of transfer only one-eighth of the farm was conveyed to G., *the remaining one-eighth being registered in* M.'s *name.*

Thereafter M. *died and at the date of the application to the Court his estate was unrepresented.*

G. *remained in possession of and occupied the one-fourth of the farm until his death in 1893.*

Thereafter G.'s *widow and executrix applied, under the Derelict Lands Act of 1881, to have the one-eighth of the farm, registered in* M.'s *name, transferred to her husband's estate.*

The Court made no order, but suggested the appointment of an executor dative to M.'s *estate.*

Ex parte Zondagh. — *Re* Zondagh's Estate 307

Exception—Plea—Negligence in preparing plans—Damages.

PAGE

S., *an architect, sued* W. *in her capacity as Sister Superior of St. George's Home, Cape Town, for the sum of £171 16s. 2d., balance of commission due for professional services rendered in connection with the designing and carrying out of plans for the erection of certain buildings for* W.

W. *in her plea alleged that owing to the negligence of* S. *in preparing his plans additional expenditure amounting to £500 was necessary in order that the contract might be completed, and that* S. *was liable to* W. *for the increased expenditure.* W. *also alleged that owing to improper instructions given by* S. *a further expenditure of £150 would have to be incurred, and she claimed in reconvention £650, less the amount of* S.'s *commission.*

There was no allegation in the plea that W. *had become liable for the £650, or that she had sustained damages in that amount.*

S. *excepted to the plea as being bad in law and that it afforded no defence to* S.'s *claim, inasmuch as there was no allegation in the plea that* W. *had suffered any damage, or had paid or was liable to pay any sum of money by reason of* S.'s *alleged wrongful acts.*

Held, *that the plea was bad, but leave was given to amend by inserting an allegation of damages.*

Stent v. Williams, N.O. 282

Executor dative – Removal.

The Court, on the petition of his sureties, removed an executor dative, who had been convicted of the crime of theft, and who had allowed nearly three years to elapse from the date of his appointment without filing an account.

Mathlabane and Tala v. Spogter ... 250

Growing crop—Destruction—Damages.

H., *the lessee of certain land, sold a growing crop of cabbages to* T. *on the understanding that the crop was to remain in the ground during the continuance of* H.'s *lease.*

Before the cabbages were fit for use H. *abandoned his lease and* De V. *took possession of the land as new lessee.*

De V. *failing to arrive at an understanding with* T. *with regard to the cabbages, gave him notice to remove them within nine days, and as they were not removed within that time* De V. *uprooted the cabbages and threw them away.*

T. *thereupon brought an action for damages against* De V. *in the Magistrate's Court and judgment was given for the defendant on the grounds that whatever claim* T. *had against* H. *he had none as against* De V.

On appeal, *the Magistrate's judgment was upheld.*

Trevaskis v. De Vos 241

Insolvency — Trustee — Account — Extension of time.

The Court, with a view to saving costs, granted an extension of time, within which to file his account, to a provisional trustee, who was threatened with an action to recover the value of certain assets sold by him on account of the estate and claimed by a minor.

Ex parte Hoffa. — *Re* Terblanche's Insolvent Estate 215

Joint-stock Company—Licence—Act 3 of 1864, schedule 17—Act 20 of 1884.

The 17th schedule to Act 3 of 1864, as amended by Act 20 of 1884, provides that: Every joint-stock company carrying on business in this colony shall annually take out a licence, for which there shall be payable for every £100 of the subscribed capital of such company 1s.

The term joint-stock company shall, for the purpose of the above licence, embrace: (*b*) Every such company of which the chief seat or principal

PAGE

place where its business is managed shall not be within this colony, but of which any of the dealings shall, by the deed or other instrument regulating such company, be described as to be carried on in this colony.

The memorandum of association of the H. Co., *whose principal place of business is in London, and which has been established in Cape Town since May, 1893, provides that one of the objects of the* Co. *is to carry on* "in any part of the world" *the business of wholesale and retail clothiers and outfitters.*

Held, *in an action instituted by the Colonial Government, that the* Co. *was liable to pay an annual licence of 1s. on every £100 of its subscribed capital, the language employed in the memorandum of association,* "in any part of the world," *being sufficient to include Cape Colony in terms of section 1, sub-section (b) of the schedule.*

Colonial Government v. British South Africa Company (9 Juta, 280; 2 Sheil, 216) *distinguished.*

Colonial Government v. Hepworth & Son, Limited 282

Landlord and tenant—Defective roof—Damages—Liability.

Where a landlord with knowledge that there was a defect in the roof let certain premises and rain water came through the roof and damaged goods stored on the premises.

Held, *that the landlord was liable for the amount of the damage.*

Nannucci v. Wilson & Co. 283

Libel—Letter in newspaper—Inexperienced painter—Ignorance.

In January, 1894, tenders were called for by the Colonial Government for the performance of certain external painting work at the Houses of Parliament, Cape Town,

PAGE

P. *and* C. *together with other painters tendered for the work and* P.'s *tender was accepted.*

No notice was given to the public as to who was the successful tenderer, nor was C. *aware that* P. *had obtained the contract.*

Some time after P.'s *tender had been accepted* C. *was passing the Houses of Parliament while the painting work was being carried out, and noticing the caretaker* (himself an experienced painter, of which fact C. was unaware) *giving one of the painters instructions as to how he should do his work, immediately concluded that the contract had been given to the caretaker, and being of opinion that this was unfair to the painters of Cape Town, wrote a letter to the editor of the "Cape Times" in which he remarked* inter alia *that the lowest tenderer for the painting work at the Houses of Parliament was not an experienced painter, and otherwise described him as being as unfit to do the work as a draper would be to undertake a contract for printing.*

Held, *in an action for damages for libel instituted by* P. *against* C., *to which the defendant pleaded justification, that the words complained of amounted to a technical libel, and that* C.'s *ignorance that* P. *was the successful tenderer was no excuse in law.*

Proctor v. Christ 271

Life insurance—Proposal form—False answers—Material facts — Misrepresentation—Agency.

Where it was proved that a woman about to insure her life had given false answers to the questions in the proposal form knowing them to be false, and the doctor who examined her on behalf of the Insurance Company though not its regular medical officer, knew that some at least of the answers were false and yet signed the proposal form.

PAGE

Held, *in an action by the woman's executor against the company for the amount of the policy, that the company was not liable.*

Spiers v. Mutual Life Insurance Company of New York 291

Life policy — Delivery — Effect — Will —Children—Tacit hypothec.

H. *and his wife were married without community of goods.* H.'s *wife died in 1887, and by her will she appointed her children by* H. *and a son of his by a former marriage sole heirs of her estate, which realised £6,150. She also appointed* H. *her executor, and directed that the whole of her estate should remain in the possession and under the control of her husband, until he should die or re-marry, to be used, applied, and invested without the interference of any person as he might think best for the benefit of the heirs, and after the death or re-marriage of* H. *she directed that the whole of her estate should be applied as in her will set forth.*

In 1885 H. *effected an insurance of £1,000 on his life for the sole use and benefit of his wife.*

H. *after the death of his wife entered into possession of her estate in terms of the will, and in 1893 he had lost it all in speculation.*

B. *after the death of* H.'s *wife undertook at his request to board and educate his four minor children in consideration of his paying £20 a month and recouping* B. *for any moneys expended by her in clothing and education.*

H. *paid* B. *regularly until 1890, when his payments fell into arrear, and at his death in 1894 there was a large amount due to* B.

In August, 1893, H. *not being able to satisfy* B.'s *claim, which was then due, sent her the policy of insurance and also certain plate and jewellery which had belonged to his wife, requesting her to sell them and apply the proceeds in reduction of her account.*

B. *retained possession of the policy and plate.*

Held, *in an action by* B. *against* H.'s *executor and heirs that the property in the policy, plate, and jewellery vested in* B. *and that no tacit hypothec in favour of* H.'s *minor children attached to the same.*

Buyskes v. Cosnett and Hurley's Heirs 501

Liquor licence — Bottle store — Sale after prohibited hours — Evidence sufficient to justify conviction.

The Court on appeal refused to quash a conviction for contravening the Liquor Licensing Acts where, although the evidence of the contravention was not strong, still there was sufficient, in the opinion of the Court, to justify the Magistrate in convicting.

Regina v. Havenga 269

Magistrate's jurisdiction—Appeal—Costs.

Where a Magistrate had given judgment for the amount of a claim in convention and dismissed a claim in reconvention, and on appeal from his judgment it appeared that an amount beyond his jurisdiction was in dispute,

The Court, although no exception had been taken to the jurisdiction of the Magistrate, altered the judgment to absolution from the instance both on the claim in convention and reconvention, but made no order as to costs.

Horwitz v. Lloyd... 285

2. —— Counter claim—*Bona fides.*

J. *sued* K. *in the Magistrate's Court at Kimberley for delivery of possession of certain premises situated at Wesselton, and belonging to the De Beers Consolidated Mines (Limited), the lease of which he had bought from one* D. *on the 15th August, 1892.*

In the preceding month of July one R., D.'s *father, purported to sell*

PAGE

the same premises to K., *who paid* R. *the purchase price, entered into possession, and greatly improved the property.*

In the suit between J. *and* K. *the latter excepted to the Magistrate's jurisdiction on the grounds* (1) *that the property in question was in dispute, and* (2) *that the right of occupation was of the value of £40 and upwards to* K.

These exceptions having been overruled, K. *pleaded the general issue and claimed in reconvention £100 in respect of improvements.*

The Magistrate being satisfied as to the bona fides *of the claim in reconvention, dismissed the case for want of jurisdiction.*

On appeal, *the Magistrate's judgment was sustained.*

Jurgensen v. Kunjan 278

Merchandise Marks Act—False trade description—Cigar boxes—Labels—Forfeiture.

S. and D., *carrying on business at East London, imported on behalf of a Johannesburg firm the constituent parts of cigar boxes, consisting of pieces of wood from which the boxes were to be made, and also labels to be pasted or gummed upon the boxes, both wood and labels being manufactured in Germany.*

The pieces of wood were branded Perla de Cuba *and* Habana *and on some of the labels appeared the Spanish words* Fabrica de Tobaccos.

The boxes when put together were intended to contain cigars made in the Transvaal from Havana tobacco.

Held, *in an action for a forfeiture under the Merchandise Marks Act, that the goods in question contained a false trade description and were liable to forfeiture.*

Collector of Customs v. Spence and Drury 254

PAGE

Minor—Money—Re-investment.

A mother authorised to re-invest money for the benefit of her minor daughter.

Ex parte Brown 212

Municipal Regulation—Beating drums or blowing instruments—*Intra vires*—Salvation Army.

The W. *Municipality constituted under Act 45 of 1882 passed the following municipal regulation* : No person or procession of persons shall at any time have the right to parade or proceed through the streets, screaming, shouting, yelling, beating drums or blowing instruments, without the consent first had and obtained from the Council or from some person duly authorised by them.

E. *and* others, *members of the Salvation Army,* were convicted *for contravening the above regulation, by marching in procession and playing their band through the streets of* W. *on Sunday the 19th August, 1894.*

Held, *on appeal, that the regulation was* intra vires *and that* E. *and* the others *had been rightly convicted.*

Edmunds and Others v. Wellington Municipality 306

Native Locations—Act 33 of 1892, sections 7, 11, and 13—Conditional lease—Huts—Damages.

In July, 1893, H. *entered into a verbal agreement with certain natives, who had for some years previously occupied a private location on his farm, in terms of which he gave them the right to continue to live on the farm for twelve months at a certain fixed rent, conditional on his being able to obtain the services of a European overseer in terms of the Location Act of* 1892; *failing which the natives were to leave the location at the end of the year.*

H. *failed to obtain a European overseer and notified that fact to the natives in January,* 1894, *telling*

PAGE

them at the same time that the location would have to be broken up, and giving them seven days within which to vacate their huts and leave the farm.

The natives left the farm after their huts had been burnt down by H.'s *instructions.*

Thereafter certain of the natives brought an action for damages against H. *in the Magistrate's Court and judgment was given in their favour.*

On appeal, *the Magistrate's judgment was reversed.*

M'Lingwana and Hobbs v. Gola and Seko 225

Negligence — Railway accident — Destruction of mules — Damages — Contributory negligence—Mills v. Colonial Government 263

Perpetual silence — Action — Bar — Will—Legatees.

Where legatees had lodged an objection to a liquidation account, and publicly pretended that they had an action against the executors for amendment of the account, but had allowed four months to elapse without taking any further proceedings, the Court, on the application of the executors, ordered the legatees to bring their action within six weeks, failing which, to show cause why they should not be barred by a decree of perpetual silence.

Vermaak's Executors v. Vermaak ... 308

Plea in abatement--Summons—Costs.

P. *sued* B. *for balance of account. The summons was issued on 5th September, 1892, but no further proceedings were taken.*

Subsequently P. *instructed other attorneys, and a second summons was issued on the 15th December, 1893.*

On the 5th April, 1894, the first summons was withdrawn, and on the 23rd May, 1894, the costs of the first summons were paid by P.

PAGE

On the 28th May, 1894, B. *filed a plea in abatement and prayed that* P.'s *declaration and summons might be quashed.*

The Court *overruled the plea in abatement with costs, but gave* B. *leave to plead within three days.*

Partridge v. Blake 280

Post-nuptial contract—Registration.

Where a post-nuptial contract had been registered in ignorance of the facts that the contracting parties who had intended to exclude community were married at the date of its execution, the Court ordered the contract as registered to have the effect of an ante-nuptial contract, saving the rights of creditors who became such prior to the date of registration.

Ex parte Loots and Wife 239

Prescription — Trust-money — Acknowledgment of debt—Will—Legacy.

S. *at the age of six months or thereabouts became deaf and dumb and remained so during life.*

On the death of her parents in 1872 S. *went to live with* J. *and his wife, and while so living with them* J. *received on her account* £100, *which had been bequeathed to her by her grandparents.*

J. *died in* 1879 *without having paid the* £100 *to* S.

Under J.'s *will his wife was appointed executrix and took out letters of administration, and in an account which she filed with the Master she brought up the* £100 *as a debt due by her husband's estate to* S.

Thereafter in 1881 J.'s *wife, being as she thought on the point of death, wrote an acknowledgment of the debt of* £100 *due to* S., *and handed the acknowledgment to one* B.

J.'s *wife died in* 1892 *without having paid the* £100 *to* S., *but by her will she gave* S. *a legacy of* £100.

After the death of J.'s *wife her executors refused to recognise* S.'s

PAGE

claim in respect of the debt of £100 *on the grounds that it was prescribed.*

Held, *in an action against the executors for the debt of* £100 *and for the legacy of* £100, (1) *that prescription had not run as against the first* £100 *inasmuch as it was trust-money, and* (2) *that the legacy of* £100 *was intended to be in discharge of the debt.*

Strydom v. Jacobs's Executors 221

Promissory note—Liquidity—Act 43 of 1885, section 5 (*a*)—Magistrate's jurisdiction.

Stephan Brothers *sued* Engelbrecht *in the Magistrate's Court on a promissory note for* £62 2*s.* 6*d. made by one* Visser *in favour of one* Smit.

On the back of the note appeared the signatures of Smit *and* Engelbrecht.

The Magistrate granted absolution from the instance on the grounds that the claim was illiquid and beyond his jurisdiction.

On appeal, *the Magistrate's judgment was upheld.*

Stephan Bros. v. Engelbrecht 236

Provisional sentence—Promissory note —Want of consideration.

L. *was indebted to the estate of* M. *in the sum of* £176 2*s.* 9*d.*, *and on demand being made for payment asked for an extension of time within which to borrow the money.*

An extension of three months was given and L. *passed his promissory note for the amount of the debt in favour of the executor payable three months after date.*

The executor's agent charged L. *a commission of* 4½ *per cent. on the amount of the claim, and* L. *signed a promissory note for* £7 1*s. in favour of the agent, payable on the same date as the note for* £176 2*s.* 9*d.*

The agent endorsed the note for £7 1*s. in blank, and the notes not being paid on the due dates, the executor as the legal holder claimed provisional sentence on both.*

PAGE

The Court refused provisional sentence on the note for £7 1*s. on the ground that the agent had given no consideration for it.*

Metelerkamp's Executor v. Landman ... 237

Slander — Privileged communication— Damages

D. *acting* bona fide *and without malice, told* L., *the wife of one of her husband's tenants, that* L.'s *daughter* E., *a child of 13, was in the family way by one* R.

E. *had been in the service of* D. *and used to attend* D.'s *Sunday-school.*

The statement made by D. *to* L. *with regard to* E. *was untrue.*

Held, *in an action for damages for slander brought by* R. *against* D., *that the communication made by* D. *to* L. *was privileged.*

Roberts v. Duthie 287

Theft—Mules—Conditional sale.

L. *sold two mules to* T. *subject to the condition that they were to remain* L.'s *property until the last instalment of the purchase price had been paid.*

Before the first instalment had been paid T. *bartered the mules for other property.*

Held, *on appeal, that* T. *had been rightly convicted of the theft of the mules.*

Regina v. Tobias 313

Trade mark — Infringement — Pipes — Interdict.

Held, *in an application for an interdict, that the use of the letters* RRR *placed triangularly in a triangle on pipes was an infringement of the registered trade mark* BBB *placed triangularly in a diamond.*

Frankau & Co. v. Pope 210

2. —— Infringement — Candles — Interdict.

The Court granted an interdict restraining the respondents, a firm carrying on business in Port Elizabeth, from selling candles manufactured by them and bearing on the

PAGE

wrappers the device of a ship in full sail, on the grounds that the device was an infringement of Price's well-known trade mark, although the ship as used by the respondents was differently rigged to that of Price's.

Price's Patent Candle Company (Limited) v. Everitt & Co. 211

Vagrancy – Wandering — Act 23 of 1879, section 4—Act 27 of 1889, section 2—Presumption—Failure to rebut.

Where K. *had been convicted of wrongfully and unlawfully wandering over a farm without the permission of the owner, and the Magistrate who convicted found as a fact that* K. *was wandering about the farm for the purpose of stealing honey, and that consequently the presumption raised by section 4 of Act 23 of 1879 had not been rebutted, the Court on appeal refused to set aside the conviction.*

Regina v. Kukkuk 311

Will—"All our children"—Construction.

R. *and his wife executed a mutual will, which contained* inter alia *the following provision:* "Further we declare it to be our express wish and desire that the immovable property belonging to our estate, that is, De Plaat (now our dwelling-place) and portion of the farm Schalkwyk's River, remain in the undisturbed possession of the survivor until his or her death, when the same shall have to be publicly sold, when *all our children* shall come in as heirs in equal shares as regards the proceeds of the same."

PAGE

R. *and his wife had no issue of their marriage, but by a previous marriage* R. *had nine children, and his wife by a previous husband two children.*

Held, *that the expression* all our children *referred to the children of both the previous marriages, and that each such child or his representative was entitled to* $\frac{1}{11}$*th of the proceeds of the property.*

Rossouw's Executor Dative and Heirs v. Rossouw's Executor Testamentary 289

2. ——House—Fidei-commissum.

Where a house had been bequeathed to seven legatees subject to the condition that it should not be sold before the death of the longest living of them, and that the proceeds should be then divided among their children, and one of the legatees, with the consent of the others, had sold the house to the Colonial Government, the Court refused to authorise the Registrar of Deeds to register the transfer.

Ex parte Nadea.—*Re* Nakiba's Will ... 215

Work and labour — Settlement — Counter-claim.

Where judgment had been given in a Magistrate's Court for the original defendant on a claim in reconvention, the amount claimed having been included, as the appellate Court found, in a previous settlement arrived at between the plaintiff and the defendant, the Court altered the Magistrate's judgment to judgment for the defendant in reconvention and gave him his costs of appeal

Constable v. Theron 270

REPORTS OF ALL CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE YEAR 1894
(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE SUPREME COURT.

VOL. IV.
(1894.)

CAPE TOWN:
PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S ST.
1895.

JUDGES OF THE SUPREME COURT DURING THE YEAR 1894.

Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice.)

Hon. Mr. Justice BUCHANAN (Acting Chief Justice from 16th June, to the 9th October).

Sir JACOB BARRY, Knt., J.P., E.D.C. (Sat at Senior Puisne Judge during the August Term).

Hon. Mr. Justice UPINGTON, K.C.M.G.

Attorneys-General.

Hon. H. H. JUTA, Q.C.

„ W. P. SCHREINER, Q.C., C.M.G.

TABLE OF CASES.

VOL. IV.

	PAGE
Abrahams v. Abrahams	320, 330, 359
Adams (a minor), *re*	201
Ainsworth v. Mosenthal & Co.	347, 364, 415
Alberts' Trustee v. Kaplan and Others	59
Alford, Wills & Co. v. Daniels	309
Aliwal North Board of Executors v. Diesel	31
Anderson, *re*	456
Anderson, *ex parte*	186
Anderson's Assignee v. Anderson's Executors	447
Arderne & Co. v. Stevens	135
Argus Co. v. Chambers	99
Aspeling v. De Waal	372
Aspeling v. Du Toit and Others	2
Assistant Treasurer-General v. Opperman	372
Auret v. Haarhoff's Executor	124
Austin v. Osborne	33
„ v. Raphael	276
Baatjes v. Baatjes	317, 324, 325, 355, 428
Badenhorst, *re*	301
Badenhorst v. Badenhorst	158, 207
Bain v. Botha	364
Bank of Africa v. Rechter	3
Barkly East Reporter v. Spran	317
Barnard (minors), *re*	359
Barry's Life Policy, *re*	445
Batchelder v. Batchelder	36, 98, 100
Bayly v. Bayly	10, 12, 70, 128
Beedle & Co. v. Meyers	295
„ v. Solomon	396
Behrens v. Behrens	72, 169
Bell, *re*	107
„ v. Fraser & Co.	314
Benjamin v. Benjamin	365
Bergh v. Beedle	396
Berkeley, *ex parte*	100
Bester, *in re*	53
Bester's Executor v. Bennett's Executor	326
Bevern's Trustees v. Kretschmar	26
Bezuidenhout, *ex parte*	100
Bierman's Insolvent Estate, *re*	53
Bilborough v. Hill	397
Bisset, *ex parte*	215
Blanckenberg v. The Colonial Government	61
Board of Executors v. Burger	152
Bosch's Estate, *re*	330
Botha and Lind v. Prins	169, 201, 209
Bradford v. Green	326, 436
Bradshaw v. Hudson	140
Braud v. Cowling & Co.	267
Brandt, *alias* Brown, *re*	268, 427
Braude v. Verdoes	427
Brenner & Others v. Duncombe	35
Breytenbach v. Smit's Executors	98
Bright and Boulton v. Dargood's Exrs.	363
Brink & Co. v. Taylor	329
Briscoe v. Rolfe	138, 152, 207
Broad v Schultz and Smith. — *Re* Roberts's Estate	64, 72, 98, 127
Brook's Estate, *re*	124
Brown, *ex parte*	427
Brown, *ex parte*	212
Brown v. Bruce	33
Bruton, *ex parte*	152
Bryant's Trust, *re*	6
Budd v. Budd and Freeman	170
Budd v. Yeomans and Budd	250
Budler v. Jeppe and Another	240
Building Society v. Rhoda	319
Bultitude, *ex parte*	419, 457
Burdett's Estate, *re*	325, 358
Burger, *ex parte*	325
Burger, *ex parte*. Re Burger's Will	105
Burghersdorp Reformed Church v. Coetzee	72, 113
Burke, *ex parte*	115
Burns v. Town Council of Cape Town	314
Buyskes v. Cosnett and Hurley's Heirs	301

	PAGE
Caledon Municipality v. Bougaard and Others	419
Camp, *ex parte*	426
Cape of Good Hope Bank (in liquidation), *re*	3, 10, 125, 209, 251, 268, 321, 322, 355
Cape Stock Farming Company, *re*	11
Cape Town Harbour Board v. Cowling & Co.	267
Carey, *ex parte.—Re* Carey's Will	129
Carl v. Carl	250, 268, 291
Carslaw v. Koch	24
Carter v. Stewart.—*Ex parte* Carter	159
Carter v. Stewart	218
Cauvin v. Cardinal	99
Chism, *in re*	31
Chowles, *ex parte*	13
Cilliers v. Benadie	53
Clark v. Johnson	428
Clark v. Town Council of Cape Town	42
Clarke, *ex parte*	320
Classen v. Grundling's Executors	98, 169
Clegg v. Greene and A.C.M., Griqualand East	361
Clements v. Lotter	152
Close, *ex parte*	127
Coetzee, *ex parte*	32
Coetzee (a minor), *re*	194
„ v. Bartie	396
„ and Another v. Brown	216
Coetzee's Estate, *re*	458
Cohen, *ex parte*	320
„ v. De Villiers	320
Collector of Customs v. Spence and Drury	186
Collie and Duffus v. Butler	127
Collier and Hill v. Vercuil	129
Colonial Government v. Dean	113
„ v. Hepworth & Son (Limited)	282, 311
„ v. Lloyd	319
„ v. Opperman	314
„ v. Schermbrucker	60
„ v. Spence & Drury	214, 254
Colonial Orphan Chamber v. Muller	186
Combrinck, *ex parte*	324
Combrinck (minors), *re*	152
Conroy v. Jackson	210
Constable v. Theron	270
Cook Bros. v. Colonial Government	444
Cooke, *ex parte*	168
Cordes v. Moorrees	386
Costello (minors), *re*	268
Court v. Court	419, 427
Cowen v. De Villiers	320
Cranko v. Gibson	249
Crockart's Will, *re*	100
Currey v. The Incorporated Law Society	15
Curtis, *ex parte*	419
Curtis v. Runge	309
Cutting's Estate, *re*	398
Dasilva v. Dasilva	428
Davis Allen v. Kimberley D. M. Co.	321
Davis v. Baer	111, 128
Davis v. Davis	268
Dawe, *ex parte*	340
Daws v. McLeod	358
Day v. Day	373
De Bruyn's Executors v. Steyn	208
De Bruyn's Executors v. Wahl	99
De Klerk, *ex parte*	358
De Marillac, *ex parte*	329
Delport v. Le Roux	3
De Smit v. Afzelius	27, 53
De Wet, *ex parte.—Re* Estate Jones and Wife	126
De Villiers, *ex parte*	205
De Villiers, *ex parte*	354
De Villiers, *ex parte*	419
De Villiers v. Vlok	157
De Villiers & Co. v. Divisional Council, Calvinia	158
De Witt v. Cape Canning Co.	36, 116
Dickerson, *ex parte.—Re* Jamieson's Will	158
Dixon v. Dixon	397
Dickson & Co. v. Levy	51
Dixon v. Dixon	13
Dobson's Estate, *re*	14
Doubell v. Tipper	37
Dowers v. Goodman	355, 446
Drury and Burgers' A.N. Contract, *re*	445
Duminy v. Prins	128
Dunkelsbuhler v. Liquidators Cape of Good Hope Bank	202
Du Plessis v. De Bruyn and Another	218
Du Plessis v. Ferreira	134
Du Plessis v. Rudd	319
Du Plessis v. Du Plessis	14, 156

	PAGE
Du Preez, *ex parte*	115
Du Preez's Estate, *re* ...	108, 205
Du Preez v. Van Coller ...	72, 111
Dutch Reformed Church, Calvinia v. Biccard	267
Dutch Reformed Church, Stanford, *re* ...	36
Duthie v. Benn	67
Du Toit and De Waal v. Greef's Estate	157, 199
Duxbury, *ex parte*	186
Dyer & Dyer v. Botha	426
Eady v. Eady	31, 53
Eayrs v. Best	338
Eastern Province Guardian Co., *re* ...	7
Eaton, Robins & Co. v. Philip ...	208
Eaton, Robins & Co. v. Vos	2
Edmeades' Insolvent Estate, *re* ...	36
Edmunds and Others v. Wellington Municipality	306
Eilenberg v. Beyers	71
Eilenberg v. Jacobson & Co ...	364, 396, 458
Elffers, *ex parte*	205
Elliott, *ex parte*	458
Ellis's Insolvent Estate, *re*	446
Erlank, *ex parte*	209
Fagan's Estate, *re*	10
Falconer v. Behr & Co.	69
Falconer v Walder	392
Fatiema's Estate, *re.—Ex parte* Rioloen	323
Februarie, *ex parte*	152
Ferreira's Estate, *re*...	4
Ferreira's Trustees v. Ferreira's Executors	156
Findlay & Tait v. Marais	3
Firbank, *ex parte*	3
Fisk, *ex parte.—Re* the Bishop's Church Aid Fund	398
Fittig, *ex parte.—Re* Riddle's Estate ...	128
Flemmer v. Van Straaten and Another	112, 318
Fleming v. Fleming	297
Fletcher & Co. v. Froneman	3
Fletcher & Co. v. Kimber	113
Forrest & Co. v. Cowling	295
Fox, *ex parte*	216
Frame & Myburgh v. Boosé	345
Frank & Co. v. Teague	194
Frankau & Co. v. Pope	210
Fraser v. Frank Johnson & Co. ...	79
Fraser & Co. v. Kerr	327
Frere Hospital, East London, *re* ...	123
Friedrich, *ex parte*	320
Garlake, *ex parte*	71
Garlick and Ruddle, *ex parte*	10
Garreau, *ex parte*	217
Gavin, *re*	221
Gerd's Executors v. White ...	127, 186
Gerrand, *ex parte*	31
Gibson, *ex parte*	168
Gibson, *ex parte.—Re* Wicht's Estate ...	214
Gibson & Morgan v. Manley and the Albert Licensing Court	196
Gladstone v. Stableford	297
Glaiser's Executors v. Quin	14
Glendenning's Insolvent Estate, *re* ...	456
Glynn, *ex parte*	3
Glynn, *ex parte*	124
Goldsmith, *ex parte*	115
Goodwin v. Stanton	1
Goodyear, *ex parte*	309
Graham's Executors v. Bester ...	309
Graham's Executors v. Sutherland ...	152
Greef v. Van der Westhuysen ...	28
Greef's Executrix v. Lewin	31
Greef's Executrix v. Steytler and Wilmott	109
Green v. Bradford	301, 320, 436
Green v. Keese	207
Green v. Fuller and Coetzee	2
Green v. Mandy	372
Greyvensteyn, *ex parte*	3
Grundling's Executors v. Lategaan and Others	333
Guthrie, *ex parte*	99
Haarhoff's Trustee v. Freislich ...	352
Haarhoff's Trustee v. Mason... ...	208
Haasbroek, *ex parte*	334
Hall v. Hill	99
Hallak's Insolvent Estate, *re*	195
Halse v. Halse	215, 290
Hampson v. Stuart	165
Hanau v. Kruger	168
Hanau v. Marais	3
Hand & Co. v. Engles & Another ...	419
Hand and Others v. Du Toit and Fischer	216
Hand and Others v. Samey	168

	PAGE
Harris v. King's Executor ...	... 354
Harris v. Rossouw's Executor	... 396
Harvey v. Harvey	139, 173
Haug v. Lithman & Co. ...	... 208
Hawkins' Estate, *re* ...	311, 356
Hayward v. Hayward ...	140, 158, 443
Hearns v. Jackson's Executrix	... 329
Heathcote, *ex parte*	... 324
Henderson, *ex parte*	35
Hendritz v. Du Toit ...	... 319
Henn v. Henn	... 333
Hennings v. Hennings ...	... 426
Herbert, *ex parte.—Re* Herbert's Will	... 111
Herman, *ex parte.—Re* Krul's Estate	... 239
Herman's Executors v. Van Heerden	... 31
Hertzog v. Strydom ...	... 208
Hertzog v. Woest's Estate ...	... 240
Heydenrych v. Ebrahim ...	... 329
Heydenrych v. Farmer ...	... 44
Heydenrych v. Vincent ...	... 158
Hiddingh, *ex parte*	... 115
Hill, *ex parte*	... 443
Hill v. Bilborough.—*Ex parte* Hill	... 130
Hill Bros. v. Reich	43, 445
Hilliard v. Dymott	... 443
Hirsch, *ex parte*	... 186
Hodgson v. Du Preez ...	... 340
Hoffa, *ex parte.—Re* Terblanche's Estate	... 215
Hofmeyr v. Dean	.. 290
Hofmeyr and Regter v. Wahl	... 426
Holst, *ex parte*	... 310
Home, *ex parte*	... 53
Home v. Conservator of Forests	... 335
Hope Aerated Water Co. v. Gibbs	... 261
„ „ „ Co. v. O'Callaghan	360
Hopkins, *ex parte*	... 59
Horak's Insolvent Estate, *re* ...	... 127
Horn, *ex parte*	... 186
Horne, *ex parte*	... 147
Horwitz v. Lloyd	... 285
Hoskins v. Ellis	... 318
Hoyle, *ex parte*	... 324
Hudson v. Bradshaw ...	124, 171
Hudson, Vreede & Co. v. Kuper ...	2
Hudson, Vreede & Co. v. Van der Westhuizen	... 139
Hunt, *ex parte*	... 317
Incorporated Law Society v. Walker	... 397
Incorporated Law Society v. Phear	... 15
Independent Companions' Society v. Stemmet	... 228
Irvine (a minor), *re* ...	... 202
Irvine, *ex parte*. *Re* Bullen's Insolvent Estate	... 1
Irvine v. Irvine	48, 169
Jaarsveld's Estate, *re* ...	... 59
Jagger & Co. v. Pfuhl ...	... 113
„ v. Robb ...	... 31
„ v. Teich ...	... 2
Jamieson's Will, *re*	... 158
Jansen, *ex parte*	... 3
Jeke v. Judge	... 132
Johnson, *ex parte*	... 71
Jones & Co v. Weisman ...	... 290
Jooste v. Adamstein ...	... 59
„ v. Keyter	... 309
„ v. Petzer	77, 309
Jordaan's Trustee v. Fletcher & Co.	... 64
Jordens v Cape Divisional Council	... 174
Joubert v. Van der Merwe ...	... 347
Julies v. Markwick	... 355
Jurgens v. De Villiers ...	... 443
Jurgensen v. Kunjan ...	... 278
Kaiber v. Kaiber	... 129
Kemper, *ex parte*	... 140
Kendrick, *ex parte*	... 158
Kennemeyer, *ex parte* ...	... 86
Kerr and Another v. Manley and Others	196
Keytel, *ex parte*	... 241
Keyter's Insolvent Estate, *re*	... 329
Kimber, *ex parte.* — *Re* Kimber's Insolvent Estate	... 162
Kimber's Insolvent Estate, *re*	... 170
Kingsmill and Anderson, *ex parte*	... 100
Klaiber v. Klaiber 209, 311, 372, 426,	428
Kleyn's Estate, *re*	... 323
Klopper v. Van Straaten ...	... 101
Knysna Divisional Council v. Kannemeyer and Others ...	... 209
Koch v. Carslaw	... 24
Koch v. Mair	12, 72, 88
Koller's Executors, *ex parte* ...	... 32
Kriel, *ex parte*	... 309
Krige v. De Waal	136, 177
Kruger, *ex parte*	... 71
„ v. Van Reenen 214, 215, 250,	372
Krynauw & Co. v. Reyneke ...	... 208
Kunne v. Roubinek	427

PAGE

Kuys v. Bredell 208
Kyd, *ex parte* 153

Landry, *ex parte* 7
Langa, *ex parte.*—*Re* Hlankomo's Estate 325
Lange's Insolvent Estate, *re* 291
Langfield v. Whittlesea Village Management Board 231
Larkin (Minors), *re* 11, 12
Lawrence v. Lawrence ... 291, 427
Lawrence v. Lotter 13
Lawton, *ex parte* 216
Lee, *ex parte* 295
Leen v. Leen 71, 123
Lennon & Co. v. Chambers 2
Leonard v. Scott 374
Leppan, *re* 355
Le Roux v. Fuller 2
Levenson, *ex parte* 445
Lewin v. Van der Westhuizen ... 354
Lewin's Insolvent Estate, *re* ... 73, 108
Lewis, *ex parte* 419
Lewis & Co.'s Insolvent Estate, *re* ... 108
Lewis & Co. v. Morsner 418
Lewis v. Holt & Holt 115
Liebenberg's Estate, *re* 332
Lindhorst v. Keyter 128
Lippert v. De Marillac 330
Liquidators Cape of Good Hope Bank v. De Beers Consolidated Mines and Imroth 155, 451
Lloyd, *ex parte* 53
Loan M. & M. Agency v. Reed ... 426
Longworth & Co. v. Morton 13
„ v. Richards ... 443
Loock v. Kluyts 194
Loots and Wife, *ex parte* 239
Lotter (Minors), *re* 4
Loubser (Minor), *re*... ... 240, 268
Lourens' Estate, *re* 1, 18
Lourens v. Lourens' Trustee ... 36, 72
Louw v. Louw 33, 36
„ v. Malan and Smuts 426
Louwrens, *ex parte* 325
Luscombe v. Bryant 329
Lyons v. Cape Town Jewish Public School 140, 158, 258
Lyons and Smith, *ex parte* 98

Mac Colla, *ex parte* 324
Madolo v. Munkwa 195

PAGE

Mahomet v. Abba 2
Makalela v. Makalela 13, 128, 251, 323, 426
Malan, *ex parte* 205
Malcolm's Trustee v. Haase Vaughan & Co. 208, 217
Mandy's Insolvent Estate, *re*... ... 374
Manley v. Gibson and Morgan ... 217
Mariucowitz's Estate, *re* 139
Maritz v. Pratly 351
Mason v. Mason 324
Master v. Berrangé 86
„ v. Biccard 301
„ v. Davids and Another ... 372
„ v. Jones's Executors 319
„ v. Masterson's Trustee ... 358
„ v. Keyter 301
„ v. Marincowitz's Executors ... 216
„ v. Prins' Executor ... 396, 418
„ v. Ruiter's Trustee 358
„ v. Smit's & Leo's Trustee 324, 357
„ v. Stone's Executor ... 208, 357
„ v. Theron & Van Eeden's Trustee 324, 357
„ v. Turton's Trustee 359
„ v. Wiengartz's Executor 396, 418
„ v. Werner and Others ... 418
Mathlabani and Tala v. Spogter ... 250
McGrath v. McGrath ... 7, 218
McKay's Estate, *re* 14
McKenzie, *ex parte* 317
McKenzie's Estate, *re* 396
McLeod, *ex parte* 35, 201
„ v. Meyers 309
McLeod's Insolvent Estate, *re* ... 99
McLeroth, *ex parte* 443
McWilliams, *ex parte* 109
Meintjes' Estate, *re* 300
Meiring, *ex parte* 3
Mendelsohn v. Judelsohn 53
Mercantile Corporation U.S. and S.A., *re* 241
Metelerkamp's Executor v. Landman ... 237
Meurant (minors), *re* 240
Mewes, *ex parte.*—Mewes v. Mewes ... 131 156, 195, 209
Meyer v. Schoeman and Others 141, 456
Meyer's Estate, *re* 169, 458
„ Insolvent Estate, *re* ... 53, 169
„ Trustee v. Jones 396
Michau, *ex parte* 31
„ (minors), *re* 213
„ v. Michau's Executor ... 384

	PAGE
Michler v. Saunders	38
Miles' Estate, *re*	107
Miles v. Clarke	419, 427, 444
Milligan, *ex parte*	114
Mills v. Colonial Government ...	263
Milne v. Milne ...	217, 221, 241, 297
M'Lingwana and Hobbs v. Gola and Seko	225
Mogamet and Others v. Moliat ...	162
Moll, *ex parte*	443
Moller, *ex parte*	309
Molony v. Colonial Government ...	166
Molteno, *ex parte*	71
Moodie v. Hampet and Another ...	426
Moore v. Moore ...	221, 240, 301, 311, 332
Moore and Saayman's Ante-nuptial Contract, *re*	4
Morgan & Small v. Young	48
Moroney (minors), *re*	240
Morris v. Pippin	309
Morris v. Wessels	99
Mostert, *re*	399
Mostyn-Cleaver, *ex parte*	396
Mutual L. A. Society v. Shepstone ...	135
Mutual L. A. Society v. Van Wyk and Another	113
Myburgh, *ex parte*	99
Myburgh's Executors v. Blanckenberg's Executor	310
Nadea, *ex parte*.—*Re* Nakiba's Will ...	215
Nannucci v. Pedersen Bros. ...	113, 290
„ v. Wilson & Co.	233
Naude, *ex parte*	249
Neethling, *re*	137
Nissen v. Moolman	208
North-Eastern Bultfontein (Lim.), *re*.—*Ex parte* L. & S. A. Exploration Co.	399
Odendaal v. Swart	53
Oliver v. Oliver	13, 71
Omaruru Gold Mining Co., *re*	317, 357
Oppenheimer v. Steel	71
Overbeek and Another v. Venter ...	329
Paarl Bank (in liquidation), *re* ...	128
Paarl F. A. Co. v. Marais	113
Paarl Fruit Preserving Co, *re*	187, 209
Palmer's Estate, *re*	3
Partridge v. Blake	280
Paulse and Roelof v. Theunissen ...	236
Pawlay's Estate, *re*	129
Paxman v. Paxman	71
Pearce v. Pearce	34
Pepler, *ex parte*	35
Peters v. Pote	201
Petersen v. Little	295
Phear & Co. v. Diffenthal	327
Phillips v. Goddard	213
Pietersen v. October and Others ...	146
Pilkington v. Quin's Executor ...	319
Port Elizabeth Divisional Council, *ex parte*	125
Porter, *ex parte*	240
Poswa v. M'bukwe	419
Pote v. Gerrard	2
Pote v. Peters	157, 201
Potgieter v. Van der Heever's Executors	66
Pretorius (minor), *re*	205
„ v. Greeff	419
Price v. Price	100
Price's P. Candle Co. (Limited) v. Everitt & Co.	211
Prince, N.O., v. Adam and Zoer ...	9
Prince, Vintcent & Co. v. Friedman ...	2
Prince, Vintcent & Co. v. Olinsky ...	168
Prince, Vintcent & Co. v. Simon ...	186
Prins' Executors v. Lind	4
Prinsloo's Insolvent Estate, *re* ...	445
Proctor v. Christ	271
Purcell v. Fatima	53
„ v. Purvis	53, 71
„ v. Watson	99
Quin v. Pilkington and Divine ...	436
Radomeyer, *ex parte*	320
Randall v. Graham's Town Municipality	39
Rautenbach's Estate, *re* ...	314, 320
Raybould, *ex parte*	426
Reed, *re*	107
Reed's Insolvent Estate, *re*	195
Regina v. Adams	195
„ v. Burke	314
„ v. Clickman	315
„ v. Cooper and Another ...	104
„ v. De Jong	396
„ v. Du Preez and Badenhorst ...	252
„ v. Gwyi	144
„ v. Havenga	269
„ v. Isaacs	459

	PAGE
Regina v. Jiswa	... 380
„ v. Jantje Sly ...	... 8
„ v. Krombien ...	... 111
„ v. Kukkuk	... 311
„ v. Margolius ...	359, 440
„ v. Maylow	... 112
„ v. Meyer	... 348
„ v. Neethling ...	... 7
„ v. Picqueer	... 315
„ v. Reed	... 219
„ v. Rensburg and Others	... 78
„ v. Ruiters	... 1
„ v. Salmon Klaas ...	... 153
„ v. Sampson, Groeneveld & Others	64
„ v. Simonhoff ...	... 438
„ v. Solomon	... 108
„ v. Taylor	.. 254
„ v. Tobias	... 313
„ v. Van Rensburg ...	... 35
„ v. Willem Wentzel ...	... 192
„ v. Wright	... 104
Retief, *ex parte*	... 426
Retief & Co. v. Robb ...	... 327
Reynders v. Reynders ...	... 31
Riedemann (miners), *re* ...	... 99
Robb's Insolvent Estate, *re* ...	... 386
Roberts v. Duthie	... 287
Robinson v. Robinson ...	... 243
Roos v. Resident Magistrate of Robertson	334
Rosich v. Rosich	... 71
Ross v. De Wet	... 249
Ross & Co. v. Loubser ...	... 99
„ v. Louw ...	... 113
Rossouw, *ex parte*	... 354
Rossouw's Estate, *re* ...	108, 123
Rossouw's Executor and Heirs v. Rossouw's Executor	... 209, 278, 289
Rothkuger, *re*	... 193
Rothman, *ex parte*	... 31
Rowe v. Rowe	... 27
Rudd v. Colonial Government	127, 142
Runciman v. Hantam ...	... 208
Sadie, *ex parte*	... 3
Sagar, *ex parte*	... 98
„ v. Rossenkrans ...	... 113
Sage's Estate, *re*	... 241
Schmidt's Estate, *re*	313, 397
Schnitzler, *ex parte*	.. 35
Schoeman, *ex parte.—Re* Honiball	... 399
Schroeder's Estate, *re* ...	... 373
Schwalbe, *ex parte*	... 152
Scholtz v. Dean	... 2
Sear, *ex parte*	... 249
Secretan's Insolvent Estate, *re*	... 185
Sellar Bros. v. Dean... ...	... 290
Sephton v. Uyapi	... 348
Serrurier v. Serrurier	... 320, 329, 373
Sharpe's Executors v. Van der Byl	... 2
Shaw, *ex parte*	... 320
Shoebel's Executrix v. Van Rooyen	... 14
Short's Estate, *re.—Ex parte* Stone	... 125
Siebert v. Siebert	313, 427
Simons, *ex parte*	... 456
Small & Morgan v. Young ...	... 48
Smit, *ex parte.—Re* Smit's Will	... 215
Smit v. Dean	... 107
Smit v. Gabier	... 107
Smit v. Smit	177, 251
Smith v. Broad	... 14
Smith v. Muff, trading as James & Co....	33
Smith v. Smith	128, 373
Smuts v. Van Zyl	... 415
Snooke, *ex parte*	... 125
Snyman, *re*	... 373
Snyman's Insolvent Estate, *re*...	... 9
Soeker v. Rolfe	139, 152
South African Association v. Jefferson...	319
„ „ v. Visser ...	2
South African L. & A. Co. v. Carslaw & Koch	... 59
South African Orphan House v. Beedle	99
Spark's Ante-nuptial Contract, *re*	... 195
Spencer, *ex parte*	... 216
Spendlove v. Gunning ...	... 216
Spiers v. Mutual of New York	... 291
Spiers & Co. v. Benadie ...	... 371
Spolander v. Spolander ...	... 73
St. Leger, *ex parte*	... 139
Standard Bank v. Holmberg & Wiid	... 354
„ v. Meyer ...	... 186
„ v. Oppenheim ...	8
„ v. Sheard ...	... 396
„ v. Van Buuren	... 327
Stander's Insolvent Estate, *re*	... 140
Stanley, *ex parte*	... 209
Steele v. Steele	... 4
Stegmann v. Board of Executors, N.O.	439
Stemmet v. Trustees Independent Companion Society ... ,,,	,,, 203

	PAGE
Stemmett's Estate, *re*	291
Stent v. Williams, N.O. ...	282, 365
Stephan Bros. v. Engelbrecht... ...	236
„ v. Sybel and Others ...	442
Stewart, *in re*	134
„ v. St. Mary's Convent, Wynberg	186
Steyn's Executors v. Steyn	75
„ Trustee v. Gous	356
Stier v. Louw	31
Stone, *ex parte*	138, 169
Stone's Estate, *re*	108
Strachan v. Colonial Government ...	405
Strasburger v. Trebor Frères ...	129
Straus, *ex parte*	7, 121
Streak v. Streak	36, 140
Strydom v. Jacobs' Executors ...	221
„ v. Strydom's Trustee ...	429
Strydom's Insolvent Estate, *re* ...	127
Suttar and Others v. Rabanie ...	216
Swanepoel v. Birk	6
Swart's Estate, *re*	397
Swemmer v. Calitz	241
Sybel and Others, *ex parte*	457
Syfret, *ex parte*	301
„ and Another v. Van Dyk	314, 329
Te Water v. Wright	208
Theron v. Woolf	18
Theunissen, *ex parte*...	320
„ v. Van Rensburg	334
Tomes v. Tomes	249, 372
Town Council of Cape Town v. Dawes	53
Town Council of Cape Town v. Hiddingh's Executors	159
Town Council of Cape Town v. Murison	443
Trevaskis v. De Vos	241
Truter, *ex parte*	168
Twentyman and Others v. Du Preez ...	128
Tyfield v. Tyfield	72
Union Bank, *re*	169, 310, 324
Van Breda's Estate, *re*	320
Van der Byl & Co v. Basson & Blatt ...	207
Van der Byl & Co. v Du Plessis ...	443
Van der Byl & Co. v. Fuller	99
Van der Byl & Co. v. Holmberg and Another	320
Van der Heever v. Van Rooyen ...	73
Van der Riet, *ex parte*	214

	PAGE
Van der Riet & Goodwin, *ex parte* ...	241
Van de Sandt de Villiers & Co. v. Biccard	290
Van der Spuy, *ex parte*	4
Van der Westhuizen v. Badenhorst ...	443
Van der Westhuizen v. Raubenheimer's Executors	329
Van der Westhuizen v. Van der Westhuizen	389
Van der Westhuizen v. Van der Westhuizen's Executors	330
Van Dyk, *ex parte*	1
Van Dyk v. Williamson	327
Van Heerden, *ex parte*	187
Van Holst, *ex parte*	310
Van Noorden, *ex parte*	436
Van Noorden v. Vedders and Another	249, 319
Van Reenen, *ex parte*	398
Van Rensburg's Insolvent Estate, *re* ...	298
Van Rooi v. Myburgh	350
Van Rooyen, *ex parte*	217
Van Ryn & Co v. Secretan	168
Van Wyk v. Sauer & Orsmond ...	149
Van Wyk's Estate, *re*	333
Van Wyk's Executors v Biccard ...	290
Van Zyl, *ex parte*	115
Vermaak's Executors v. Vermaak,	308, 358, 427
Vermeulen's Estate, *re*	373
Versveld's Executors v. Friedman	139, 140
Verwey (minor), *re*	313
Vetter v. Bydell and Uys's Assignee ...	445
Viljoen v. Ras	348
Viljoen's Trustees v. Viljoen and Others	13
Villiersdorp Municipality, *re*	168
Vintcent, *ex parte*	206
Visser's Insolvent Estate, *re*	325
Vivier and Others, *ex parte*	158
Von Post, *ex parte*	205
Vosloo's Estate, *re*	321
Wagner v. Wagner	11, 43
Ward, *ex parte*	268
Wasserfall v. Wasserfall	14
Wasserman v. Levin	432
Watermeyer and Van der Merwe v. Wege	135, 187
Watkinson's Insolvent Estate, *re* ...	140
Watson v. Chambers and another ..	320

	PAGE
Watson v. Haupt	329, 402
Webber, *ex parte*	... 446
Wentzel, *re*	... 187
Wentzel & Schleswig v. Gadow	... 443
Wentzel & Schleswig v. Smuts	... 100
Wessels' Petition, *re* ...	... 14
White, Muller & Co. v. Fuller & Coetzee	2
Whittling v. Whittling	... 268, 301, 333
Wicks, *ex parte*	... 168
Wiggell's Estate, *re* ...	 445
Wiley & Co. v. Knox ...	... 208
Wilhelm v. Beamish ...	... 19
Wilson v. Mostert and Another	... 168
Wisdom & Co. v. Horn & Co.	... 53
Woest v. Woest's Executors ...	208, 318
Wolfaard v. Klopper ...	... 152
Wolff v. Solomon's Trustee ...	... 1
Wolff's Executor v. Neser ...	... 13
Wood, *ex parte*	... 115
Wood Brothers' Insolvent Estate, *re*, 59,	185
Woodford v. Woodford ...	... 148
Woodhead, Plant & Co. v. Gunn	... 20
Woodhouse's Insolvent Estate, *re*	... 241
Worcester Commercial Bank, *re*	... 443
Zackon v. Van Rhyn and Arp's Trustee	101
Zeederberg v. Ablesohn ...	... 208
Zietsman (minors), *re* ...	... 445
Zondagh, *ex parte*.—*Re* Zondagh's Est.	307

INDEX OF TITLES IN THE DIGEST.

	PAGE
Account	... 345
Act 23 of 1888	... 8
Administrators	... 109
Adultery	170, 195, 243, 389
Agent	... 334
Animal Diseases	144, 219
Ante-nuptial Contract ...	4, 205
Appeal	... 203
Architect	116, 365
Articled Clerk	... 153
Assault	... 213
Assignor and Assignee ...	... 447
Attachment	6, 155
Attorney	15, 295, 397
Auction	... 351
Auctioneer	... 149
Benefit Society	... 228
Bond	... 289
Building Contract	48, 297, 402
Bye-Law	... 291
Child	... 250
Co-Executors	... 340
Collation	... 75
Commission	... 9
Compromise	... 322
Contract	166, 258, 261
Costs	217, 236
Criminal Appeal	... 336
„ Lunatic	... 459
„ Prosecution ...	252, 359
Crown	... 61
„ Liability	... 405
Curator Bonis	... 399
Derelict Lands Act	... 307
Divisional Council	... 174
Dogs	... 67
Election Petition ...	135, 136, 177, 187
Evidence	... 444
Exception	33, 282, 343
Execution	... 199
Executor	320, 436
„ Dative	250, 355
„ Testamentary ...	108, 126
Expropriation	... 159
Extradition	... 198
Fidei-commissum	... 121
Fraudulent Alienation ...	... 140

	PAGE
Growing Crop	... 241
Hotel Business	... 98
Husband and Wife	38, 428
Insolvency	10, 109, 185, 215
Insolvent Ordinance	... 327
Interdict	... 159
Interest	... 326
Interpleader Suit	... 364
Intestacy	... 323
Joint-Stock Company ...	... 282
Jurisdiction	77, 330
Land	... 171
Landlord and Tenant ...	... 233
Lease	... 130
Legacy	... 66
Libel	146, 271
Life Insurance	... 291
Life Policy	... 301
Liquor Licence	196, 269
Lost Bond	82, 138
Lunatic	... 137
Magistrate's Jurisdiction	18, 73, 278, 285
Marriage in community ...	... 131
Master and Servant	338, 348, 432
Merchandise Marks Act ...	... 254
Minor ... 33, 59, 124, 129, 147, 148, 212	
Mohammedan Church ...	... 162
Monthly Accounts	... 360
Municipal Rate	... 39
„ Regulation ...	... 306
Municipality	... 419
Native Locations	... 225
„ Marriage	... 132
„ Territories Penal Code ...	... 380
Negligence	... 263
Non-negotiable Note	... 101
Non-Performance of Duty ...	... 352
Notary	60, 86
Notice of Appeal	... 419
Partners	... 440
Pauper	... 446
Penalty	... 69
Perpetual Silence	... 308
Plea in Abatement	... 280
Police-Constable	... 192

	PAGE
Post-nuptial Contract	239
Power of Attorney	4
Prescription	221
Principal and Agent	88, 415, 451
Promise by Advertisement	79
Promissory Note ...	24, 236, 363, 347
Provisional Sentence	237
Public Road	7
Purchase and Sale	392
Res Judicata	356
Review	361
Scab Act	104
Scotch Law Agent	114
Seduction	372
Senatus Consultum Velleianum	26
Shares	202
Slander	19, 287, 350
Spes Successionis	105
Spray Pump	142
Summons	3, 37, 51
Theft	122, 153, 313, 348, 438
Town Council	42
Trade-mark	210, 211, 215
Trees	335
Trespass	28
Trust	6
Undue Preference	64
Usufruct	430
Vagrancy	311
Vindicatio	20
Will ...	158, 215, 289, 317, 384, 439
Wills Ordinance	111
Winding-up by Court	399
Work and Labour	270, 386
Written Agreements	44
Wrongful Dismissal	374

CASES DECIDED IN THE SUPREME COURT,

CAPE COLONY.

SUPREME COURT.
(IN CHAMBERS.)

[Before the Acting Chief Justice (Mr. Justice BUCHANAN.)]

Ex parte MCKENZIE. { 1894. Oct. 2nd.

Mr. Molteno moved for the admission of Mr. James Donald McKenzie as an advocate.

Mr. McKenzie took the oath of allegiance, and was duly admitted.

BARKLY EAST "REPORTER" V. SPAAN.

On the motion of Mr. Searle, Q.C., this case was removed, the defendant consenting, to the next Circuit Court to be held at Barkly East.

BAATJES V. BAATJES.

Application for leave to sue *in forma pauperis* in an action for divorce.

Referred to Mr. Currey for report.

Re OMARURU GOLD-MINING COMPANY, IN LIQUIDATION.

Mr. Juta, Q.C., presented the first report of the liquidators.

The Court made the usual order, the notices to be published in the "Cape Times," "Argus," and "Gazette."

Ex parte HUNT. { 1894. Oct. 2nd.

Will—Presumption of death—Executors testamentary.

Where a person, who had made a will, had been absent from the Colony for 42 years and there was strong presumption that he had been lost at sea, the Court granted a rule calling upon all persons interested to show cause why the will and death notice should not be filed, and letters of administration granted to the executors named in the will.

This was the petition of Sarah Ann Hunt (born Hawkins).

The petitioner alleged that she was the daughter of Henry and Sarah Hawkins, who at one time resided at Claremont.

That petitioner's mother died in February, 1863, and in 1852 her father left this colony for Melbourne to try his fortune at the Australian gold-fields at Ballarat.

Some little time after the petitioner's husband, William Hunt, went to Australia, where he met his father-in-law, and after working with him at the gold-fields for about eight months, returned to the Colony, leaving Henry Hawkins still at the gold-fields.

Two years after Hunt's return to the Colony, Hawkins wrote to say that he was returning, and would be back by Christmas, but since the receipt of his letter nothing has been heard of him, although, as the petitioner alleged, she had made every inquiry for her father through advertisement, through the Colonial Government at Melbourne, and had done everything in her power to find what had become of him, but without success.

About the time the petitioner's father intended returning to the Cape several vessels were lost, and a relative of petitioner's husband, who was leaving Australia for England, and who intended to travel with Hawkins as far as the Cape, has also never been heard of. The petitioner alleged that she was of opinion that her father must have been on board of one of the vessels which were lost. Hawkins at the time he left for Melbourne was between forty-five and forty-six years of age, and if he is still alive he would be close on ninety years old.

Hawkins executed a will in 1851 under which he appointed the petitioner his sole heir on the death of his wife, and the petitioner, in terms of the will, entered into possession of her father's estate on the death of her mother in 1868.

Amongst the assets in the estate was a cottage situate at Rondebosch, which the petitioner sold in April, 1873, agreeing and undertaking to give transfer when in a position to do so. The purchaser, after waiting for twenty years, is now anxious that the cottage should be conveyed into his name.

The petitioner alleged that her father parted with his family on the best of terms, and that she had no reason to believe that he ever executed another will, or revoked the one referred to in the petition.

The prayer was for an order authorising the Master to file the will of Henry Hawkins, and to issue letters of administration to the executors named therein, authorising them to deal with the estate as though the death of Hawkins had been duly reported to the Master as required by law.

The Board of Executors were appointed executors under the will.

Mr. Molteno was heard in support of the application, and relied on *Ex parte Craig* (3 Sheil, 218), and the cases there cited.

The Court made an order similar to that made in *Ex parte Abrahams, re Safodien's Estate* (3 Sheil, 145), and granted a rule *nisi* returnable on the first day of next term.* One publication in the "Gazette."

[Petitioner's Attorneys, Messrs. Fairbridge & Arderne.]

SUPREME COURT

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice BUCHANAN.]

PROVISIONAL ROLL.

HOSKINS V. ELLIS. { 1894. Oct. 12th.

Mr. Watermeyer moved for provisional sentence for the sum of £200, due on a mortgage bond, with interest at 6 per cent. from July 1, 1893.

The order was granted.

WOEST V. WOEST'S EXECUTORS.

Mr. Benjamin applied that the provisional order for sequestration granted by Mr. Justice Buchanan on September 22 be made final.

The order was granted.

FLEMMER V. VAN STRAATEN AND ANOTHER. { 1894. Oct. 12th.

Mr. Molteno, for the plaintiff, applied for a writ of civil imprisonment on an unsatisfied judgment for £106 10s., less £37 2s. 6d., together with interest from February, 1894, and taxed costs amounting to £12 0s. 6d. There had been a return of *nulla bona*.

Mr. Graham, for the defendants, said they were unable to pay anything. He read affidavits stating that they were in absolute poverty, owing to losses in stock, that they were at present working as farm labourers, and were totally unable to meet the claim.

The plaintiff filed answering affidavits, in which he alleged *inter alia* that the first-named defendant drew annually interest on moneys with the Master of the Supreme Court, being inheritance money of his wife's minor children by her first husband named Hattingh.

That on 18th August, 1891, the first-named defendant gave him a statement of his affairs which showed that he possessed a farm valued for Divisional Council purposes at £1,100 and mortgaged for £1,320 15s. 6d., 1,600 head of small stock and 100 head of cattle and horses, the new cart with harness complete and household furniture, the stock and other movable property being valued at £1,040, and that his debts did not exceed £100.

And that the second-named defendant valued his estate at £508, not including 167 well-bred merino rams valued at £352.

The plaintiff further alleged that he was willing to accept any reasonable offer in monthly payments from the defendants.

The Chief Justice asked if the defendants had any offer to make.

Mr. Graham said he was instructed, and the affidavits showed, that they were not in a position to make any offer whatever.

The Chief Justice said: The evidence is fairly satisfactory that the defendants really have no means whatever, but even if they had, it strikes me that it would be far better to give up the proceedings for civil imprisonment, and proceed against the defendants for sequestration of their estate. If they have concealed property, sequestration would be the best means of getting at that property. We think, therefore, the application for civil imprisonment should be refused. We also think that the plaintiff is entitled to his costs; so that if he proceeds by way of compulsory sequestration he will be able to prove his costs upon the insolvent estate of the two defendants. The reason why we give costs is because the plaintiff has been misled by the statements as to the means of the two defendants.

[Plaintiff's Attorney, G. Montgomery-Walker; Defendants' Attorneys, Messrs. Van Zyl & Buissinné.]

* On the return day the rule was made absolute. REP.

HENDRITZ V. DU TOIT.

Mr. Benjamin moved for provisional sentence for £250, with interest at 6 per cent. from the 10th April, 1894, on a mortgage bond; also that the property specially hypothecated should be declared executable.

An order was made as prayed.

VAN NOORDEN V. VEDDERS.

Mr. Currey applied for a writ of civil imprisonment against the defendant on an unsatisfied judgment of this Court.

Granted.

COLONIAL GOVERNMENT V. LLOYD. { 1894. Oct. 12th.

Mr. Giddy applied for provisional sentence for £350, being the second instalment of the purchase price of a certain piece of ground; also for £3,150, the balance of the said purchase price. He handed in the conditions of sale.

The Chief Justice: Has the first instalment been paid?

Mr. Giddy: Yes, it has been paid.

An order was made for provisional judgment for the amount with interest.

THE MASTER V. JONES'S EXECUTORS. { 1894. Oct. 12th.

Mr. Giddy applied for an order calling upon the defendants to file their accounts, with costs *de bonis propriis*.

Mr. Innes, Q.C., who appeared for Mr. Nash, one of the executors, said his client did not deny that he should file accounts. He had been prevented from doing so by the action of his two co-executors, who were sons of the deceased, and who were in possession of the estate, which was a very large one, and of all the documents. He put in an affidavit with correspondence annexed, showing that Mr. Nash had frequently asked his co-executors to file accounts, and they had not done so. He came before the Court now principally upon the question of costs.

The Chief Justice: Has he ever taken proceedings against his co-executors?

Mr. Innes: Yes; in 1892. There are two sons and three daughters of the deceased, and the two sons are co-executors with Nash. The three sisters and Nash took steps in 1892 to have the other executors removed, but shortly before the action was to come on for trial it was compromised, the co-executors undertaking that the estate should be wound up. That was in November, 1892, and from that time to this they had done nothing in regard to realising the estate. On the 5th October, a week ago, the co-executors wrote to Nash, giving him notice that they had drawn up an account, and asking him to come and sign it. It was impossible in that short time to go into the matter to ascertain if it were a proper account.

Mr. Graham, who appeared for the other two executors, said that time had not been given to reply to the affidavit of Nash.

Mr. Innes stated that there was a dispute with reference to a sum of £19,000 due by the co-executors to their father, and the receipt for which produced by them was challenged. There were also other matters in dispute.

The Chief Justice said: It is impossible for the Court to deal with disputes between Nash and his co-executors. They have not yet had an opportunity of filing an affidavit in answer to that by Nash. They are, however, clearly bound to file an account. The Court will make an order for an account to be filed within a month of this date, and that the three defendants pay the costs of this application *de bonis propriis*. If Nash is correct in his affidavit, he will have the right to recover any costs he may be put to by reason of his co-executors' negligence.

DU PLESSIS V. RUDD.

On the application of Mr. Graham, an order was made for the compulsory sequestration of the estate of the defendant, who resides in the district of Oudtshoorn.

SOUTH AFRICAN ASSOCIATION V. JEFFERSON.

Mr. Molteno moved for provisional sentence for £75, interest at the rate of 5 per cent. from the 1st July, 1893, to 30th June, 1894, upon a certain mortgage bond for £1,5 0; also that the property specially hypothecated be declared executable.

The Chief Justice pointed out that there was no prayer to have the property declared executable.

The order for provisional sentence was granted.

BUILDINGS SOCIETY V. RHODA.

Mr. Watermeyer applied for provisional sentence for £22 10s. 3d., balance due upon a certain mortgage bond; also that the property be declared executable.

The order was made as prayed.

PILKINGTON V. QUIN'S EXECUTOR.

Mr. Juta moved for provisional judgment for £743 7s. 2d., being the balance of money due, with interest from 20th February, 1894.

The order was granted, with a stay of execution for a month.

VAN DER BYL V. HOLMBERG AND ANOTHER.

Mr. Currey moved for provisional judgment under rule 389 for £76 9s. 9d., for goods sold and delivered with interest.

Granted.

COHEN V. DE VILLIERS.

Mr. Jones moved for provisional sentence for £3 14s. under rule 329, balance due for goods sold and delivered.

Granted.

GENERAL MOTIONS.

REHABILITATIONS.

The following rehabilitations were granted on motion from the Bar:

Abraham Hendrik Cornelis Johannes Rademeyer, Frederick Stowell Clarke, Hendrik Nicholaas Heyns Theunissen, Abraham Cohen, Johannes Frans Otto Friedrich, and John Reay Shaw.

WATSON V. CHALMERS AND ANOTHER.

Mr. Watermeyer, for the defendants, applied for an order debarring the plaintiff from proceeding with certain action for damages commenced by him against them for assault and slander, by reason that he has failed to file his declaration within the time prescribed by the rules of Court, and for an order that he do pay the costs.

The order was granted.

ABRAHAMS V. ABRAHAMS.

Mr. Buchanan, for the petitioner, moved for leave to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

Referred to counsel.

IN THE ESTATE OF THE LATE LOUISA M. VAN BREDA.

Mr. Graham moved for authority to the executor to raise a sum of money on mortgage of certain landed property of the estate known as Rocklands, situated in Cape Town, for the purpose of effecting necessary repairs to the buildings thereon.

Mr. Graham stated that the Master had reported in favour of the application.

The order was granted.

GREEN V. BRADFORD AND OTHERS. { 1894. Oct. 12th.

Mr. Watermeyer moved to make absolute the rule *nisi* for an order requiring the respondent to restore to applicant certain furniture and goods, her property, unlawfully seized, and taken possession of by them at the village of Lady Grey.

Mr. Benjamin, for the defendants, applied that the rule should be postponed until the first day of next term, to enable affidavits to be filed from Aliwal North. Affidavits were read in support of the application.

After the reading of affidavits on both sides and argument,

The Chief Justice said: In cases of this kind it has always been the practice of the Court to make the rule absolute, unless the defendant can show good cause why it should not be made absolute. In this case the charge was that the defendant forcibly, and by violence possessed himself of goods in the applicant's house on the 20th of September. The affidavit and order were served upon the defendant, and he has had ample time to answer them, and in the absence of any sufficient answer, the Court is now bound to make the order absolute with costs.

SERRURIER V. SERRURIER.

Mr. Jones moved for leave for the petitioner to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

Referred to counsel.

Re RAUTENBACH'S ESTATE. { 1894. Sept. 25th. Oct. 12th.

Executor—Land—Private sale.

Under special circumstances, and where it was clearly for the benefit of the estate, the Court authorised a p ivate sale of land to one of the executors.

This was the petition of Catharina Salomina Rautenbach (born Wait), widow of the late Petrus Gerhardus Rautenbach, and now married without community of property to Christian Adolph Muller of Cornelis Johannes Rautenbach and of Walter Jameson Wait, the duly appointed executors testamentary of the joint estate of the late P. G. Rautenbach and of the first-named petitioner.

P. G. Rautenbach and his wife (the first-named petitioner) executed a joint will in terms of which the property of the estate was left to the survivor and the children born of the marriage, and on the condition that the survivor should have a life interest in the estate.

Amongst other assets in the joint estate is certain landed property consisting of certain

nine-tenths of and in certain piece of perpetual quitrent land, with the buildings thereon, situate in the division of Uitenhage, known as and called Cypherfontein, in extent 1,690 morgen and 210 square roods, held in undivided shares and registered in the names of the late P. G. Rautenbach and his surviving brother C. J. Rautenbach, the second-named petitioner.

During his lifetime P. G. Rautenbach and his brother C. J. Rautenbach mortgaged the property for £580 0s. 0d.

On the death of P. G. Rautenbach in December, 1887, it was found that the joint estate was not able to discharge the liabilities unless the landed property were realised.

C. J. Rautenbach in order to avoid a realisation of the landed property paid the debts of the estate amounting to £607 15s. 10d., and he now alleged that he was being pressed by the mortgagees for payment of the bond.

The prayer was for an order authorising the petitioners to sell from the joint estate to C. J. Rautenbach, the second-named petitioner, 500 morgen of portion of the farm Cypherfontein for the sum of £600.

The entire farm was valued at £1,200 and the co-executors and the major heirs consented to the proposed sale, as did Mrs. Muller on behalf of her minor children.

There was also evidence from independent appraisers that the amount offered for the 500 morgen was more than the market value of the land.

Mr. Buchanan for the petitioners.

The matter first came before the Court on the 25th September, when a rule *nisi* for granted calling upon all parties concerned to show cause against the sale.

On the return day (12th Oct.) there was no opposition and the rule was made absolute.

[Petitioners' Attorneys, Messrs. Fairbridge & Arderne.]

DAVIS ALLEN V. KIMBERLEY DIAMOND-MINING COMPANY.

Application by the defendants for leave to sign judgment against the trustee of the plaintiff's insolvent estate by reason of his failure to proceed within the time required by the Rules of Court with the action instituted by the said Davis Allen prior to his insolvency.

Mr. Innes, Q.C., with whom was Mr. Currey, appeared for the applicants; the respondent in default.

A consent having been put in, the order was granted as prayed.

IN THE ESTATE OF THE LATE JACOBUS N. VOSLOO.

Mr. Buchanan moved for leave to the executors to raise a sum of money on mortgage of the farm Bloemhof, the property of the estate, situated in the district of Cathcart, for the purpose of discharging the debts of the estate, and to enable the widow and minor heirs to retain the farm for their maintenance and support.

The order was granted.

THE CAPE OF GOOD HOPE BANK. { 1894. Oct. 12th.

Mr. Innes, Q.C., presented the seventh report of the official liquidators, and prayed for an order in the usual form.

The following is the report:

The official liquidators beg to present to your Honourable Court their seventh report.

1. The claims proved and admitted up to this date amount to £2,039,923 12s. 4d., on which dividends totalling £1,912,439 13s. 3d. have been declared, and of which some 3,000 warrants of the total value of £3,875 11s. 8d. have not as yet been claimed. As regards the liabilities unclaimed. which amount to £9,776 8s. 4d., £6,157 10s. is for bank notes, and the remainder for sundry small current accounts, bills payable, &c.

2. Your liquidators have collected up to the 30th of September last a further sum of £66,000, of which £60,000 is bearing interest on fixed deposit. The remaining assets consist of open accounts and shares of the approximate value of £13,000. Of these a large proportion consists of debts and shares of but little value, which your liquidators propose to sell by tender at an early date in order to clear the balance-sheet. This realisation will enable them to pay a further dividend of about 9d. in the £, instead of 7d. in the £ as estimated in their last report.

3. Your liquidators have not thought it expedient to declare any further dividend at present. The large number of claims, being something over 7,500 in number, the large proportion of these, which are of small amount, namely, under £20, the already considerable accumulation of unclaimed dividends of small amounts, nameiy, £3,875 11s. 8d., the fact that the amount realised is bearing interest—all appear to your liquidators to combine to show the expediency in the general interests of the creditors to defer the payment of a further dividend until it can be made final. On the 19th of February, 1891, your Honourable Court fixed the amount of any dividends to be paid at a minimum of 1s. in the £, and your Honourable Court is now asked to sanction the payment of the final dividend, whatever amount it may prove to be.

4. Acting on the advice of counsel, your liquidators are instituting an action against the De Beers Consolidated Mines (Limited) and

Messrs. A. Dunkelsbühler & Co., of Kimberley, in connection with the quarter share obtained by one William Lawrence, late manager of the Kimberley branch of this bank, of the rights acquired by Mr. H. A. Ward from Mr. J. J. Wessels with reference to the farms Oliphantsfontein and Benaawdheidsfontein. Your liquidators trust that this action will be heard next month, and if that is so, they hope to be in a position to distribute a final dividend in the early part of next year.

5. The last remaining branch, namely, that of Johannesburg, was closed on the 30th of September, 1894.

6. It is with deep regret that your liquidators have to report the death of their colleague, Mr. Louis A. Vintcent, who by his energy, his zeal, his great business experience and tact, has materially assisted to the, so far, successful issue of this liquidation.

7. In view of the final closing of this liquidation, your liquidators would ask your Honourable Court to fix a date, say 30th of November next, after which no claims whatsoever shall be recognisable.

The Court made the usual order.

[Attorneys, Messrs. J. & H. Reid & Nephew.]

Re CAPE OF GOOD HOPE BANK, IN LIQUIDATION. { 1894. Oct. 12th.

Compromise—Bank in liquidation—Debtor—Name.

The Court refused to sanction a compromise proposed to be effected with a debtor of a bank in liquidation, a condition of the compromise being that the debtor's name should not be made public.

Petition of the Official Liquidators of the Cape of Good Hope Bank.—It appeared from the petition that a debtor of the bank, resident in the Colony, who owes £2,823 9s. 2d., being the balance of the principal of the bank's claim against him, exclusive of interest, which is not to be charged, had with the assistance of a friend, who had come forward to assist him and to prevent publicity, offered to pay the debt in full on condition that his (the debtor's) name should not be made public, and that his securities held by the bank amounting approximately to the value of £1,500 should be returned to him, which would leave a net gain to the bank of about £1,323 9s. 2d.

The petitioners alleged that the position of the debtor was such that a public compromise would in its effects on the debtor's position he practically tantamount to insolvency, and that in such an event the liquidators could not hope for anything like so favourable a result. That they had had full statements on affidavit of the debtor's position, which they had examined and inquired into most carefully, and they were of opinion that the interest of creditors would best be served by the Court authorising them to accept the proposed compromise and they prayed that they might be authorised accordingly.

Mr. Rose-Innes, Q.C., who appeared for the liquidators, said this was the first application of the kind made to the Court. The liquidators were satisfied that it was for the benefit of the bank.

The Chief Justice: It is rather hard on those people whose names have been mentioned that one debtor should be singled out not to be mentioned.

Mr. Innes: Yes, that strikes one at once. The only ground on which the application is made is the gain it would be to the bank.

The Chief Justice: How are we to exercise judgment in the matter? All we have is that the liquidators think the name should not be made public.

Mr. Innes said the liquidators thought it a good compromise for the bank.

The Chief Justice: At all events, I think the Court ought to know the name.

Mr. Innes: Yes; I put the question to the liquidators at once. I was informed that there had been a previous application in which certain affidavits were ordered to be sent to the Registrar, and then they became to a certain extent public property. It was one of the terms of the proposed compromise that that should be avoided. There could not be the slightest objection to your lordships being informed of the name. There is nothing in the Act with reference to the question one way or the other.

The Chief Justice: Is it to be kept secret from everybody but the parties immediately concerned?

Mr. Innes: That is the condition on which this offer was made, and it is for the liquidators to say whether it is a good compromise or not for the bank. If the Court thinks on general grounds that it is unwise to lay down the precedent, the liquidators are in the hands of the Court, and to that extent it will be detrimental to the interests of the bank. I am informed that this debt was originally £8,000. The debtor now, with the assistance of a friend, proposes to pay the whole balance. The compromise is only with regard to the interest; he will clear off the principal,

The Chief Justice: If that be so I believe this gentleman would gain in the estimation of the public rather than lose if his name were made known.

Mr. Innes: To a certain extent his character might gain, but then his pecuniary position might suffer. The liquidators have come to the conclusion that the disclosure of his name would be practically tantamount to his insolvency.

The application was refused.

The Chief Justice: A matter of principle is involved in this application. We have every confidence in the discretion of the liquidators, and no doubt they are doing their best for the interest of the contributories and all concerned in the liquidation. But at the same time it is just possible that some of those interested, if they knew the name of this gentleman, might object. That is within the bounds of possibility. Hitherto the names have all been published, and now when the liquidation is nearly complete we are asked to allow a compromise without the name of one certain person compromising being published. I do not think it is in accordance with the practice of the Court to allow secrecy of this kind. It seems to me to be rather a credit to the gentleman compromising, and that the publication of his name would not be so injurious to his credit as the liquidators seem to believe. It is better that the liquidators should lose this amount than that we should establish a principle which might hereafter admit of abuse.

Mr. Justice Buchanan: I concur in this decision. I think the liquidators are perfectly justified in making the best terms they can for the benefit of the contributories. At the same time where a principle is involved, as in this case, the Court should not depart from that principle.

[Attorneys, Messrs. J. & H. Reid & Nephew.]

IN THE ESTATE OF THE LATE GYSBERT J. P. KLEYN.

Mr. Graham moved for authority to Willem H. S. Kleyn to raise a sum of money on mortgage of certain shares in the farm Mistkraal and Midekraal, in the district of Oudtshoorn, accruing to his wife out of the said estate, to enable him to pay his *pro rata* share of certain bond on the said property, and legal and survey expenses in connection with the transfer.

The order was granted.

Ex parte RIOLOEN. } 1894.
Re FATIEMA'S ESTATE. } Oct. 12th.

Intestacy—Heir—Identity.

This was the petition of Rioloen, who alleged that he was the only son and child of the late Fatiema, who was married first to one Sarabodien and thereafter to Hadje Mochamat *alias* Abdol Garies, the petitioner being the son of the first marriage. Fatiema died intestate at Mecca in 1871 and her husbands are also dead.

The Secretary of the Orphan Chamber and Mr. C. W. Herold were appointed executors dative of the late Fatiema's estate on 17th September, 1894.

The only asset in Fatiema's estate is the sum of £433 3s. 3d. The petitioner alleged that he was born in Batavia and only came to this colony with his mother Fatiema when he was about fourteen years of age, and as no registers of births and deaths are kept by his co-religionists, and so many years have elapsed since the death of his mother it was impossible to obtain more direct evidence of his birth. That he firmly believed himself to be the son of Fatiema, whom he called "mother," and who always treated him as her son, and that consequently he considered himself justly and truly entitled to be regarded as the sole and universal heir *ab intestato* to the estate of the late Fatiema.

The prayer was for an order directing the executors dative to pay the petitioner as heir *ab intestato* the amount of the inheritance in their hands.

There were several affidavits from persons, who had known Fatiema since her arrival in the Colony, and who alleged that the petitioner had always been regarded as Fatiema's son.

Mr. Buchanan for the petitioner.

The Court granted a rule *nisi* returnable* on 8th November, calling upon all persons interested to show cause why the amount claimed by the petitioner should not be paid to him as heir *ab intestato* to Fatiema's estate. The rule to be published once in the "Gazette" and once in "Ons Land" and the "Volksbode."

[Petitioner's Attorneys, Messrs. Reitz & Herold.]

MAKALELA v. MAKALELA. } 1894. Oct. 12th.

Mr. Tredgold moved for an extension of the day fixed by the Prince Albert Circuit Court for the carrying into effect of the judgment for restitution of conjugal rights obtained by the plaintiff against her husband, and for a later return day on which the said defendant shall show cause why a decree of divorce should not be granted in the said suit.

The Chief Justice: You really ask us to amend the judgment of the Circuit Court.

Mr. Tredgold: Practically that, my lord.

*On the return day the rule was made absolute. REP.

The Chief Justice: How can we do that?

Mr. Tredgold: There is no other Court to go to but this one.

The Chief Justice: The only legal way in which the Court can relieve you is this. The Circuit Court has removed the case into the Supreme Court. Final judgment has still to be given by this Court. The case having been removed into this Court, I think the Court has it in its power to extend the return day. The Court will therefore extend the time fixed by the Circuit Court from the 12th October to the 15th November, and extend the day of return from the 1st of November to the last day of November.

THE UNION BANK.

Mr. Graham applied for an order in terms of the fifth report of the official liquidators. The report, he said, had been laid upon the table for the usual period, and notice to that effect had been published in the papers.

An order was made for the confirmation of the report.

THE MASTER OF THE SUPREME COURT V. THERON, AND VAN EEDEN'S TRUSTEE V. SMITH, AND LEO'S TRUSTEE V. STONE'S EXECUTOR.

Mr. Giddy applied for rules *nisi* requiring respondents to show cause why orders shall not be granted for the attachment of their persons for contempt of Court in respect of their failure to file certain accounts ordered to be furnished by them in their said capacities.

Rules were granted in each of the three cases, returnable on November 8.

SUPREME COURT.

[Before Mr. Justice BUCHANAN.]

Ex parte HOYLE. { 1894. Oct 16th.

Mr. Tredgold moved for the admission of Mr. James Johnson Hoyle as a conveyancer. The admission was ordered, the oaths to be taken before the British Resident, Pretoria.

BAATJES V. BAATJES.

On the motion of Mr. Currey, a rule *nisi* was granted, returnable on Tuesday next, calling upon the defendant to show cause why the plaintiff should not be allowed to sue *in forma pauperis* in an action for divorce.

The Court adjourned until Tuesday next.

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte HEATHCOTE. { 1894. Oct. 23rd.

Mr. Jones moved for the admission of Mr. James William Heathcote, of Engcobo, as a conveyancer.

The application was granted, the oaths to be taken before the Resident Magistrate at Engcobo, Tembuland.

Mr. Justice Upington asked if there was anything in the law requiring notice of these applications to be given to the Law Society.

Mr. Jones replied in the negative.

Mr. Justice Upington: There appears to be a defect in the law. Nothing can be said against Mr. Heathcote, but supposing an application were made by a person of no character whatever, who was capable of passing the examination, as a matter of course an order is given to admit him as a conveyancer. It seems to me that this is a great defect.

Mr. Justice Buchanan: It is well worth considering whether on applications for the admission of conveyancers a certificate should not be forthcoming that the applicant is a fit and proper person to be admitted as a conveyancer.

Ex parte COMBRINK.

Mr. Maskew moved for the admission of Mr. William Godfried Combrink as a conveyancer.

Mr. Combrink having taken the oath of allegiance was duly admitted.

Ex parte MACCOLLA.

Mr. Watermeyer moved for the admission of Mr. Charles James MacColla as attorney.

The application was granted, and Mr. MacColla took the oath of allegiance.

MASON V. MASON. { 1894. Oct. 23rd.

Mr. Molteno, on behalf of the plaintiff, applied for leave to sue by edictal citation in an action instituted by her against her husband for restitution of conjugal rights, failing which for a divorce.

In her affidavit the plaintiff stated that her husband left her five years ago, that he was sentenced to eighteen months' imprisonment for a crime committed in the Free State. He escaped from prison, and she believed went to the Transvaal. She had heard nothing from

him, but she understood that he was wanted by the Transvaal authorities for highway robbery and murder.

Mr. Justice Upington: Isn't it a farce that when the petitioner's husband is wanted for highway robbery and murder, that she should coolly ask him to restore her conjugal rights.

Mr. Molteno: Well, my lord, she is entitled to them.

Mr. Justice Buchanan: The chances are that he is not in the Transvaal now.

Mr. Molteno: That is where we last heard from him. It would be difficult to say where he is now.

Mr. Justice Buchanan: Take an order for leave to sue by edictal citation, the rule to be served personally, if possible, failing which one publication in the "Friend of the Free State" and one in the Johannesburg "Star," the rule to be returnable on the first day of the February term.

Ex parte BURGER. { 1894. Oct. 23rd.

This was the petition of Maria Magdalena Burger, formerly widow of the late Jacobus A. van der Merwe. On the 20th April, 1891, the petitioner passed a mortgage bond for £200, the balance of the purchase price (£250) on a piece of land called Gallant's Puts, situate in the division of Calvinia, which she bought under the Crown Lands Disposal Act 15 of 1887. On 19th September, 1894, she sold the land in question to her two minor and two major sons by her first marriage for £250, they consenting to take over the bond for £200 in part payment of the purchase price, under Act 16 of 1890, section 1. The petitioner, in her capacity as mother and natural guardian of her minor sons, prayed for an order to enable the minors to take over the liability to the Colonial Government under the bond, and for her, in her aforesaid capacity, to sign the necessary notice for so doing, or to ratify the notice already signed by her.

Mr. Sheil was heard in support of the petition.

Mr. Justice Buchanan: I see the petition has not been referred to the Master, a course which should be adopted, as the Court has frequently held, whenever the interests of minors are concerned.

Mr. Sheil: The sale is so clearly for the benefit of the minors that it was not considered necessary to incur the expense of the Master's report.

The Court granted the order as prayed, subject to the Master's certificate that the transaction is for the benefit of the minors.

[Petitioner's Attorney, S. J. Mostert.]

U 2

Re VISSER'S INSOLVENT ESTATE.

Mr. Tredgold moved, on behalf of G. W. Steytler, for an order appointing him trustee in this colony of the above estate.

The application was granted.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte LOUWRENS. { 1894. Oct. 30th.

Mr. Watermeyer moved for the admission of Mr. Peter Arnold Louwrens as an attorney and notary.

Mr. Louwrens took the oath of allegiance and was duly admitted.

Re THE MINORS BURDETT.

Mr. Juta, Q.C., moved for the appointment of himself as *curator ad litem* to represent the said minors in an action about to be instituted by their mother against the executors of their father's estate, by reason of their failure to administer the same in terms of the will, and to fulfil the trust imposed upon them.

The order was granted as prayed.

BAATJES V. BAATJES.

Mr. Currey moved for an extension of the return day of the rule *nisi* requiring the respondent to show cause why applicant, her husband, shall not be admitted to sue *in forma pauperis* in an action for divorce by reason of her alleged adultery.

The rule was extended to the 8th November.

Ex parte LANGA.—*Re* LEWANI HLANKOMO'S ESTATE. { 1894. Oct. 30th.

This was the petition of Adam Langa, of Ox Kraal and Kamastone Location.

It appeared from the petition that Lewani Hlankomo was in his lifetime the registered owner of certain two lots of grounds situate in the division of Queen's Town, location of Ox Kraal and Kamastone, under two quit-rent grants dated 4th July, 1879.

Lewani Hlankomo died in 1893, but previous to his death he authorised Nebani Hlankomo,

his brother, to sell the ground above referred to, and acting under these instructions Nebani Hlankomo on 12th October, 1885, sold the lots of ground to the petitioner, and duly received payment for the same and handed the titles to the petitioner.

Lewani Hlankomo was a native and belonged to the Fingo tribe, and was the holder of a certificate of citizenship.

By Act 18 of 1864 (the Native Succession Act) all the property belonging to Lewani Hlankomo at the time of his death falls to be administered and distributed according to the customs and usages of the Fingo tribe or people relative to the administration and distribution of property left by deceased persons at their death.

The petitioner alleged that according to the customs and usages of the Fingo tribe or people Nebani Hlankomo was the proper person to administer the estate of the deceased; that the Government had approved of the transfer, and that he was desirous of having the lots of ground registered in his name in the Deeds Registry of the Colony.

The prayer was for an order authorising the Registrar of Deeds to pass transfer of the ground to the petitioner,

The matter was referred to the Resident Magistrate of Queen's Town, and he certified that having caused inquiries to be made by the Superintendent of Fingoes at Kamastone Location, and ascertained that Lewani Hlankomo was dead, that he had never been married, and that Nebani Hlankomo was his eldest surviving brother, and as such was the legal representative and the proper person to administer the estate.

The Registrar of Deeds reported that, as there was no executor, application would have to be made to the Court (*Re Moheshwe*, 5 Juta, 330, and *Re Mabonga*, 6 Juta, 317).

Mr. Buchanan for the petitioner.

The Court granted a rule *nisi*, returnable on the 15th November next,* calling upon all persons interested to show cause why the transfer should not be passed as prayed. The rule to be served personally on Nebani Hlankomo if possible and to be published once in the native paper, "Imvo."

Before the making of the rule absolute, the transfers in the cases of Moheshwe and Mabonga to be examined so as to guide the Court as to the form of transfer in the present case.

[Petitioner's Attorneys, Messrs. Fairbridge & Arderne.]

* On the return day the rule was made absolute. REP.

BRADFORD V. GREEN. { 1894. Oct. 30th.

Mr. Benjamin applied to vary the order of the Court of October 12, requiring the applicant to hand over to respondent certain furniture.

The applicant's affidavit having been read,

The Chief Justice said: The Court will stay execution of the order of the 12th October for the restoration of the furniture, security of £100 to be given by the applicant to abide by the judgment of the Court in an action to be forthwith instituted by the applicant for a declaration of rights in regard to the said furniture, the costs of the rule of the 12th October to be forthwith paid by the applicant, the costs of this motion to be costs in the cause.

A rule *nisi* was also granted calling upon the respondent to show cause why the applicant should not be allowed to proceed *in forma pauperis* in an action for a declaration of rights as to the furniture in question and for damages. The rule to be returnable on 15th November.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

BESTER'S EXECUTOR V. BENNET'S EXECUTOR. { 1894. Nov. 1st.

Interest—Mortgage bond—Summons—Provisional sentence.

Where on the face of a mortgage bond it appeared that interest at half per cent. per annum was payable and the summons in a provisional case claimed the amount due on the bond and interest,

The Court *granted provisional sentence for the amount claimed with interest, but refused to hold that the half per cent. per annum interest stipulated for in the bond was intended for interest at half per cent. per month or 6 per cent. per annum.*

Prayer for provisional sentence on a summons for £50 balance due on a mortgage bond for

£75, with interest from the 1st December, 1861. The bond stipulated for the payment of interest at half per cent. per annum, but in 1865 notice was given calling up the balance due on the bond and interest at half per cent. per month.

Mr. Tredgold, moved and pointed out that the stipulated rate of interest which appeared in the bond had clearly been inserted in error, and that it was intended that the rate of interest should be half per cent. per month; he consequently asked for judgment, with interest at 6 per cent. per annum.

The Court granted provisional sentence, with interest as prayed in the summons and costs, and declared the property executable.

[Plaintiff's Attorney, C. C. de Villiers.]

RETIEF AND CO. V. BOBB.

Mr. Molteno moved for provisional sentence for £200 with interest from May 15, 1894, upon a promissory note.

Granted.

PHEAR AND CO. V. DIFFENTHAL.

Mr. Webber moved for provisional sentence for £10 upon a promissory note.

Granted.

FRASER AND CO V. KERR.

Mr. Benjamin moved that the provisional order for sequestration of the defendant's estate, granted by Mr. Justice Upington on September 8, be discharged, the parties having come to terms.

Granted.

VAN DYK V. WILLIAMSON.

Mr. Currey moved for judgment under rule 329 for £1 5s., money lent; also for provisional sentence on two promissory notes, one for £9 10s., less £4 paid on account, and the other for £7, less £6 10s. paid on account.

Judgment was given for the first claim, and provisional sentence on the second.

STANDARD BANK V. VAN BUUREN. { 1894. Nov. 1st.

Insolvent Ordinance—Section 30—Petitioning creditor—Security—Value—Promissory note.

The Court discharged a provisional order for the sequestration of an estate, where the petitioning creditor made no reference in his petition to, and placed no value upon, a promissory note held by him as collateral security, although in the summons upon which he obtained judgment, for the non-payment of which the insolvency proceedings resulted, he tendered the promissory note in question among other securities held by him.

Mr. Rose-Innes, Q.C., applied that the provisional order for the sequestration of the defendant's estate, granted on October 18 by Mr. Justice Buchanan, be made final.

The facts as alleged in the petition on which the provisional order was granted are as follows: On 18th August, 1892, the Standard Bank obtained judgment in the Supreme Court against Van Buuren for the sum of £272 1s. 2d. with interest from 1st August, 1892, and costs, the petitioners tendering to make delivery a cession to the defendant of certain shares and claims. That there was now due to the bank upon the judgment after giving credit for moneys received on account the sum of £178 12s. 8d. and the further sum of £8 0s. 10d. taxed costs.

On 5th September, 1894, the bank issued a writ of execution on the judgment to which there was a return of *nulla bona*, and in consequence the defendant committed an act of insolvency,

The bank prayed that the defendant's estate should be placed under sequestration.

In the verifying affidavit accompanying this petition appeared a list of the shares held by the bank, upon some of which a value was put.

Mr. Juta, Q.C., for the defendant, opposed the application on the ground that the plaintiffs, as petitioning creditors, had not placed a value on a certain security which they held, in terms of section 30 of the Ordinance.

The defendant in his affidavit denied that he had committed an act of insolvency in failing to satisfy the writ of execution, inasmuch as he alleged, that the bank held at the time of the issue of the writ, and still holds, securities pledged and assigned by him to the bank of more than sufficient value to cover his entire indebtedness.

That on 18th August, 1892, the plaintiff (the bank) obtained judgment against him for the sum of £272 1s. 2d. (tendering to him the defendant), *inter alia*, against payment of the amount of the judgment, delivery of a promissory note for the sum of £243 19s. 3d. made by one A. H. McLeod in the defendant's favour and held by the bank as collateral security for his (the defendant's) indebtedness.

That in the writ of execution issued against him by the plaintiff no tender was made of the aforesaid security nor of the other securities held by the plaintiff against his indebtedness, and that in the proceedings for provisiona

sequestration of his estate no mention whatever was made of McLeod's promissory note, nor was any value placed upon such security. The defendant further alleged that he had urged upon the bank the necessity of taking steps against McLeod, who was well able to pay, to recover payment of the balance due on the note, namely, £206 13s. 9d.

In the summons in the provisional case the bank tendered amongst other *securities* McLeod's note for £243 19s. 3d. on which, as the summons alleged, there is a balance due of £206 13s. 9d.

The manager of the Cape Town branch of the Standard Bank in his replying affidavit to the above denied that the bank held or hold securities pledged by the defendant of sufficient value to cover his debt. He alleged that McLeod's promissory note referred to by the defendant was sued upon by the plaintiffs, who obtained judgment upon it in the Transvaal against McLeod, and thereafter obtained judgment against him in the Supreme Court on the Transvaal judgment that the shares which were attached to the note were sold in execution in that country, that the note was now merged in and destroyed by the successive judgments obtained against McLeod and against the defendant, and that it was now merely a piece of paper of no value whatever.

He alleged that had the note been of any value he had a further reason for not including it in the list of securities held by the bank, namely, that he had been advised that it did not form any part of the defendant's estate in terms of section 30 of the Insolvent Ordinance, and that there was no obligation on him to mention or place any value on it in his affidavit in the proceedings for sequestration than to value the claim of the bank upon the judgment against McLeod, and that the said action and the note (if of any value) will have to be mentioned in the bank's proof of debt.

The affidavit went on to state: "The plaintiffs maintain that there was no obligation on them to excuss McLeod before proceeding against the defendant. They were wiliing to consider proposals from both the debtors, and the said McLeod did actually make an offer of settlement, which the attitude taken up by the defendant rendered it impossible to consider. I am aware that there have been disputes and recriminations between defendant and McLeod, and that the former is desirous of having the latter's estate sequestrated, but I am ignorant of the merits of the dispute between them. I wholly deny that I am aware that the debt is solely that of McLeod. The said McLeod has represented to the bank that he is wholly unable to pay even the amount which the defendant owes the bank, or any amount approaching it, which statement I see no reason to disbelieve."

McLeod filed an affidavit and alleged *inter alia* that he was not in a position to pay the sum of £206 13s. 9d. and that he had no prospect of paying such sum except by instalments, which the plaintiff had notified to him were inadequate. That he had frequently approached the plaintiff and offered to obtain assistance in order that he might effect a compromise of the debt held by the bank, but that the bank had been frustrated in any of its intentions towards a compromise through the action taken by the defendant in refusing to allow the bank to receive from him (McLeod) any but a full settlement.

Mr. Rose-Innes, Q.C., in support of the application distinguished the present case from that of *Standard Bank* v. *Winterbach* (4 Juta, 329) and referred to *Roberts* v. *Cape of Good Hope Bank* (5 Juta, 134.)

Mr. Juta, Q.C., relied on section 30 of the Ordinance and on *Standard Bank* v. *Kruger & Co.* (4 E.D.C., 47).

The Court discharged the provisional order.

The Chief Justice said: Independently of the provisions of the Ordinance it is of the utmost importance that the petitioning creditor should state to the judge all the securities which he holds upon the insolvent estate. If, in the present case, the petitioning creditor had stated that he held the security mentioned in the summons, I am not sure that the learned judge would have granted the provisional order. The terms of the 30th section which has been quoted are clear, that it is the duty of the petitioning creditor, on oath, in the affidavit accompanying the petition, to put a value on the security. The Court has held that where a value is not put upon the security, and where a provisional order is obtained, that order shall be discharged if the security has any appreciable value. The only question is whether the promissory note of McLeod was held by the bank as security obtained from Van Buuren. In my opinion the summons originally issued by the bank places this question beyond doubt. In the summons plaintiff claims £272, being balance of an account after giving credit for payments on account thereof, and the plaintiff tenders to cede, tender, and make over the following securities held against the said debt. These securities are shares, and placed on the same footing as the shares is the promissory note by A. H. McLeod —£243 19s. 3d., reduced by payments on account to £206 13s. 9d. Here is a clear admission by the bank that this was a security against Van Buuren's debt, which was held as a security,

Therefore a *prima-facie* case is made out by the defendant, in that this was a security, and the plaintiff in my opinion has not succeeded by his affidavit in rebutting that fact. It was suggested that it was merely a discount and sale to the bank, but there is no proof of that, and the bank's own admission rebuts such an assumption. Following previous decisions, the Court will discharge the provisional order for sequestration with costs.

Their lordships concurred.

[Attorneys for the bank, Messrs. Fairbridge & Arderne; Attorneys for the defendant, Findlay & Tait.

HEARNS V. JACKSON'S EXECUTRIX.

Mr. Searle, Q.C., moved for provisional sentence for the sum of £470, less £120 paid on account, upon a notarial bond made by Alexander F. Jackson, of whom defendant was executrix, in favour of S. D. Snook, and finally ceded to plaintiff on May 17, 1893; also interest from August 1, 1893.

Provisional sentence was granted.

OVERBEEK AND ANOTHER V. VENTER.

Mr. Webber moved for provisional sentence for £148 12s. 9d. upon a bond; also that the property specially hypothecated should be declared executable.

An order was granted as prayed.

BRINK AND CO. V. TAYLOR.

Mr. Maskew moved for provisional sentence on a promissory note for £12 17s. 11d., with interest from August 15, 1894, less £12 paid on account.

Granted.

SYFRET AND ANOTHER V. VAN DYK.

Mr. Molteno moved for provisional sentence for £450, with interest at the rate of 7 per cent. from January 1, 1894, on a mortgage bond; also that the property specially hypothecated should be declared executable.

The order was granted as prayed.

WATSON V. HAUPT.

Mr. Juta, Q.C., moved in this case for confirmation of the writ.

Granted.

LUSCOMBE V. BRYANT.

Mr. Currey moved under rule 329 for judgment for £151 3s. 6d., balance of account, less £100 paid on account.

Granted.

HEYDENRYCH V. EBRAHIM.

Mr. McLachlan applied for an order for the return of certain goods, or their value, £100.

Granted.

GENERAL MOTIONS.

REHABILITATION.

On motion from the Bar, the estate of Theodore de Marillac was released from sequestration.

Re KEYTER'S INSOLVENT ESTATE.

Mr. Tredgold moved for an order setting aside the election of Charles Johnson as sole trustee of the said estate, by reason of his failure to secure a majority in number and value of creditors entitled to vote, and by reason of certain proofs of debt improperly admitted at the second meeting of creditors, and for the appointment of provisional trustees pending a fresh election.

The order was granted by consent, and Mr. D. F. Marais appointed provisional trustee.

SERRURIER V. SERRURIER.

Mr. Jones moved for a rule *nisi* requiring respondent to show cause why applicant, his wife, shall not be permitted to sue him *in forma pauperis* in an action for divorce, by reason of his alleged adultery.

The order was granted, the rule to be returnable on the 15th instant.

VAN DER WESTHUYSEN V. RAUBENHEIMER'S EXECUTORS. { 1894. Nov. 1st.

Mr. Tredgold moved to make absolute the rule *nisi* granted by the last George Circuit Court restraining the said executors from selling or disposing of any portion of the piece of land called Witte Kliprug, otherwise Annex Welbedacht, in the division of George, pending an action to be brought by applicant to establish his right to the said ground.

Mr. Innes, Q.C., for the defendants, said the ground was not worth disputing. It was claimed under an oral agreement between plaintiff and Mr. Raubenheimer (deceased), and the executors had no knowledge of the transaction. If the defendants had had notice of the application that was made at the Circuit Court, they would have consented. He appeared chiefly in the question of costs.

The Chief Justice: The Court has always discouraged *ex parte* applications where it is quite possible for the applicant to give notice

to the respondent. In the present case, it is quite clear that if notice had been given to the respondents they would have said the land is not worth fighting for and would have consented to the sale going through. As executors they were not bound to take the word of the applicant, and they were quite justified in saying that they wanted proof of the alleged transaction, but when the applicant intended to proceed to extremities then the respondents' position was a different one, and from what now appears I am satisfied that they would have consented. The rule must be made absolute, but the applicant must pay the costs.

VAN DER WESTHUYSEN V. VAN DER WESTHUYSEN'S EXECUTORS.

Mr. Juta, Q.C., with whom was Mr. Tredgold, moved to make absolute the rule *nisi* granted by the George Circuit Court for an interdict restraining the said executors, and all holding under them, from departing from the terms of certain notarial agreement, in respect of the farm Klipdrift, in the district of George, pending an action for the registration of the said agreement.

Mr. Innes, Q.C., for the defendants, opposed the application, and applied to have the rule discharged as being meaningless.

The rule was made absolute by consent pending an action to be brought during this term, the question of costs to stand over.

ABRAHAMS V. ABRAHAMS.

Mr. Buchanan moved for a rule *nisi* requiring respondent to show cause why applicant, his wife, shall not be admitted to sue him *in forma pauperis* in an action for divorce, by reason of his alleged adultery.

The order was granted, the rule to be returnable on the 8th instant.

IN THE ESTATE OF THE LATE JOHANNES H. BOSCH.

Mr. Juta, Q.C., moved for the appointment of a *curator ad litem* for the purpose of defending any action which may be brought by Maria Alessa Bosch, widow of the said Johannes H. Bosch, for determining validity of certain will executed jointly by them.

Mr. Juta said the applicant (Maria Alessa Bosch) refused to take out letters of administration under the last will of the deceased until its validity had been proved. There was a prior will sent to the Master, in which she was also named as executrix, but under that the Master would not grant her letters of administration. The difference between the two wills, he understood, was that one contained a certain legacy which was not mentioned in the other.

The Master, Mr. Foster, said the only legacy mentioned was a harmonium to one of the deceased's children.

Mr. Juta suggested the appointment of Mr. Scott, of Somerset East, as curator.

The Chief Justice said it seemed absurd that so much litigation should take place about a harmonium. He thought it was better to let the matter stand over, and be reconsidered.

This course was adopted.

LIPPERT V. DE MARILLAC. { 1894. Nov. 1st.

Jurisdiction—Attachment *ad fundandam jurisdictionem*—Fraud—Malicious sequestration—Lapse of time.

In an application by the respondent, on leave reserved, to discharge an order of attachment of his luggage, ad fundandam jurisdictionem, *to enable the petitioner to institute an action for damages for malicious and fraudulent sequestration of his estate, it appeared that the sequestration had taken place eighteen years previously, without any objection on the petitioner's part, although he was aware of the statements upon which it was based, and that, before the respondent went to reside beyond the jurisdiction, the petitioner had ample opportunity of instituting his action.*

Held, *that upon these facts the Court ought not to render active assistance towards the bringing of the action by attachment, and that the order, which had been obtained without full disclosure of the above facts, must be discharged.*

This matter came before the Court on notice to the respondent's attorneys that application would be made to the Court requiring the respondent to show cause why the order granted on 29th October, attaching portion of the applicants' luggage, should not be set aside, and the respondent ordered to pay the costs of the application.

The petition on which the order was granted was of great length. The main allegations were that the petitioner's estate was sequestrated on the 7th March, 1876, on the petition of W. H. Lippert & Co.

That Lippert's affidavit was based on false statements to obtain the sequestration of De Marillac's estate, Lippert having sworn to ruin De Marillac and his brothers, if it cost him £30,000, because De Marillac had called Lippert and his brother a pair of scoundrels.

That subsequent to the sequestration of his estate De Marillac was convicted of culpable insolvency owing to perjury on the part of Lippert. That during the eighteen years that had elapsed since the sequestration of his estate he had never had a fair opportunity of proceeding against Lippert, and that unless such an opportunity were now afforded him he would be without a remedy.

That Lippert always evaded any action which he (De Marillac) attempted to bring against him.

Lippert in his answering affidavits alleged that the various statements made by De Marillac had been fully considered in the insolvency proceedings and at the trial on the charge of culpable insolvency, and he denied every allegation which accused him of any improper or illegal conduct.

As to De Marillac's statement that he had never had a fair opportunity of proceeding against Lippert, the latter alleged that in the latter half of the year 1877 he left the colony for Europe and returned to the colony in 1882. That he afterwards lived at Port Elizabeth until the year 1886, with the exception of two short trips to Europe during that time, not extending over six months together. That De Marillac was during that time resident in the Colony but made no attempt to bring any civil action against him.

That in 1886 he removed to the Transvaal, where he lived until October, 1889. During that time De Marillac was also resident in that country but never attempted to bring forward his claim. That in October, 1889, he left the Transvaal for Europe, and returned there again in April, 1890, where he remained until June, 1894; that during a considerable portion of this time De Marillac was also resident in the Transvaal but instituted no proceedings against him.

Lippert asked that the order of 29th October should be discharged, on the ground that De Marillac's claim was not *bona fide*, and that the proceedings instituted by him were taken solely with the object of causing him (Lippert) worry and annoyance.

Mr. Rose-Innes, Q.C.: The Dutch writers lay down that the procedure of arrest is granted not really to found jurisdiction, but to assist the creditor and is a matter entirely for his convenience. *Voet* (2, 4, 22, *et seq.*) That being so plaintiff should show *prima-facie* ground of success. See *Barkhuysen* v. *Van Huysteen* (1 Juta, 26). On the facts it is impossible that De Marillac can succeed.

Mr. Searle, Q.C., for the respondent: Lippert's denial of the statements made by De Marillac is only general. He has always tried to evade the matter being brought to trial. De Marillac should be allowed now to bring his action in this colony and have the questions between himself and Lippert finally settled.

The Court discharged the order.

The Chief Justice said: I confess that I granted the order with considerable reluctance. The petitioner stated that during the eighteen years which have elapsed since the compulsory sequestration of his estate he has never had a fair opportunity of suing the respondent, and that unless such an opportunity were now afforded to him he would be practically without a remedy. The action which he wishes to institute is for malicious sequestration, and it now appears that all the statements made by the respondent upon which the action is to be based had been made by him on oath in support of his petition for sequestration, and that the petitioner with full knowledge of these statements did not appear to object to the sequestration. It also now appears that the respondent did not leave the Colony immediately but three years after the sequestration, and that the petitioner had ample opportunity of instituting proceedings against the respondent whilst resident here. If these facts had been made known to me I would not have made even the limited order which the respondent, acting on the leave reserved in the order, now seeks to discharge. It is hopeless to expect that the petitioner can succeed in proving his charges of fraud, malice and perjury after submitting to a sequestration based upon the respondent's impugned statements, and failing, without reasonable excuse, to take any steps against the respondent for so many years. And even if these objections did not exist there would be extreme difficulty, in the face of the recent decision of the Privy Council in the case of *Hirsche* v. *The Asbestos Company*, to bring fraud home to the respondent. The proof which that tribunal would seem to require to support a charge of fraud is such as no person of ordinary shrewdness who defrauds another would leave room for. Now, before a person domiciled elsewhere can be dragged into the Courts of this Colony by the process of attachment, whether of his person or of his property, there should be some *prima-facie* reason for believing that the suit will be successful. The Court cannot of course enter into an inquiry

into the merits of the case, but if facts are brought to the notice of the Court which on the face of them show that the action must fail, the Court should not render its active assistance towards the bringing of the action by attachment. The order must therefore be discharged.

Mr. Justice Buchanan: In concurring that this order should be discharged, I do so on the grounds stated, and from my knowledge of the circumstances of the whole case which has frequently appeared before the Court during the past eighteen years. I have no doubt that the petitioner and plaintiff in this case, De Marillac, thinks that he has some ground for believing that he was very hardly used by Lippert, and that he has a very serious ground of complaint against him. But something more than that is wanted in order to succeed in an action. He must show fraud, misrepresentation, and perjury on the part of Lippert before he can succeed, and I am thoroughly convinced that it would be hopeless for De Marillac to think of succeeding in such an action. If Lippert lived in the Colony, De Marillac might bring his action if he chose, but he has asked for an extraordinary remedy, and gives no proof that he has a *prima-facie* case which is likely to succeed.

Mr. Justice Upington: I am of the same opinion. I also have good reason to know everything with regard to the circumstances of this case, and I must say that I regretted, and do regret at the present moment, that Mr. De Marillac should rest under the stigma of a conviction on a criminal charge.

By consent, no order was made as to costs.

Lippert's Attorneys, Messrs. Fairbridge & Arderne; De Marillac's Attorneys, Messrs. Du Preez & Walker.]

IN THE ESTATE OF THE LATE WILLIAM F. LIEBENBERG.

Mr. Buchanan applied for authority to the executrix testamentary to sell portion of the farm Liebenberg's Dam, the property of the estate, situated in the district of Victoria West, a good price having been offered for the same, and it being necessary to raise funds to discharge the debts of the estate to enable the widow to retain the remainder of the land for the support of herself and the minor heirs.

The order was granted.

MOORE V. MOORE. { 1894. Nov. 1st. „ 30th.

This was an action for judicial separation, and for the custody of the children of the marriage, brought by the plaintiff, Mrs. Wilson Moore, against her husband. Plaintiff also applied that defendant should be ordered to pay £15 per month towards the education and maintenance of herself and the children of the marriage.

Mr. Searle, Q.C., for the plaintiff; defendant in default.

Frances Mary Moore, the plaintiff, deposed that the defendant, Cunningham Wilson Moore, and she were married at Stonehouse in Devonshire, on October 29, 1881. There were three children of the marriage, boys, aged twelve, eleven, and seven years. Her husband was a civil engineer. After their marriage they travelled in Ireland and Spain, and other countries. In March, 1885, her husband got an appointment at Woodstock. They lived there for a year, then went to Barberton, and after a trip to England went in 1889 to Johannesburg, where witness only remained a few months. She last saw her husband in April, 1894. He had been manager of the Birthday Company in the Zoutpansberg. He was now Sanitary Engineer in Johannesburg, and curator of the Chamber of Mines. During the past year he had sent her £5 some months, £6 others, and nothing during other months. At no time did he send her sufficient for her maintenance. She was living with her children in a little hut lent her by friends at Kalk Bay. She had no servant. During the past year she received from her husband £30. She got a little assistance from her father and her friends in England. She tried to get employment, but without success. On August 20, 1894, after these proceedings had commenced, she received a letter from her husband, in which he admitted misconduct. (Letters from defendant were put in.) He asked her to return to him at Johannesburg previous to that, but had never sent her the means. She wrote to him once to say that she was willing to go if he would send her the means, but he did not write to her for nearly three months afterwards, and then did not send anything. She sued for judicial separation instead of for divorce on her father's advice. Fifteen pounds a month would be sufficient for the education of the boys.

Mr. Justice Buchanan: Can he afford it?

Mr. Searle: We shall get evidence of that in Johannesburg.

The case was allowed to stand over until the last day of term, an affidavit to be procured as to the defendant's means and his continued misconduct.

On 30th November, evidence of the defendant's means having been given the Court granted the decree.

The Chief Justice said: The decree of judicial separation is granted with costs; the defendant to have access to the children at all reasonable times and places. The defendant to pay the plaintiff the sum of £2 per month in respect of each of the (three) children until they respectively arrive at the age of eighteen; and to pay to the plaintiff the sum of £5 per month for her maintenance during her lifetime. Any sums received by the plaintiff under her marriage settlement to be considered as payment *pro tanto* under this order.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

HENN V. HENN. { 1894. Nov. 1st.

This was an action for a decree of divorce by the plaintiff against her husband by reason of his alleged adultery with one Henrietta Wilhelmina Montgomery.

Mr. Buchanan for the plaintiff; defendant in default.

Mr. Norman Lacy produced the original certificate of the marriage.

Maria Magdalena Henn, the plaintiff, deposed that she was married to defendant on the 17th of February, 1868. There were five children of the marriage, two of whom were minors. She and her husband lived happily up to about seven years ago, when her husband showed a preference for another woman. Three years ago he left her, and had since lived with Henrietta Wilhelmina Montgomery, with whom he still lived, and of whose child he had acknowledged himself to be the father.

Carolus Steinhus gave evidence in proof of the adultery.

Abraham Johannes Henn, son of the plaintiff and the respondent, deposed that his father was living with Montgomery's wife.

The Chief Justice: Where is Montgomery?

Witness: He lives at Pietersfontein.

The Chief Justice: Take a decree of divorce, with costs; plaintiff to have the custody of the minor children.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

GRUNDLING'S EXECUTOR V. LATEGAAN. { 1894. Nov. 2nd.

Mr. Searle, Q.C. (with him Mr. Sheil), applied for judgment in terms of consent paper handed in, which was to the effect that the sub-divisional transfers should be passed by a certain date, and that the costs be divided in a certain manner.

Mr. Molteno appeared for some of the defendants, and Mr. Tredgold for others.

Judgment was entered for plaintiffs in terms of the consent paper.

WHITTING V. WHITTING.

Mr. Watermeyer moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against the respondent, her husband, for divorce, by reason of his alleged adultery.

The order was granted.

IN THE ESTATE OF THE LATE ABRAHAM J. VAN WYK. { 1894. Nov. 2nd.

Mr. Graham moved for a further period of six months within which the executors testamentary may be allowed to file their account, by reason that the affairs of the estate are in confusion owing to the insolvency of John J. B. Biccard, the attorney entrusted with the conduct thereof by the said executors.

The affidavits having been read,

The Chief Justice asked if the allegation was that an attorney of the Supreme Court had appropriated moneys received from his clients.

Mr. Graham said that was practically the allegation.

The Chief Justice: Is nothing to be done in the matter?

Mr. Graham: No steps have been taken at present, but, no doubt, something will be done.

The Chief Justice: Will the Law Society take no action?

Mr. Graham: I am not aware that the matter has been brought under the notice of the Law Society.

The Chief Justice: It is a very hard case on these people, and under the circumstances the Court will grant an extension for six months, provided that the costs incurred by the Master be paid. I think the case should be brought to the notice not only of the Attorney-General, but also of the Law Society.

Ex parte HAASBROEK. { 1894. Nov. 2nd.

The petitioner in person applied for inquiry by the Court into the circumstances of a certain action decided in 1864, under the Land Beacons Act of 1859, whereby petitioner was seriously affected in his property, by reason, as he alleged, of perjury and fraudulent diagrams.

The Chief Justice asked if he had taken legal advice.

The applicant said he had, but the opinions of all the attorneys and barristers were against him.

The Chief Justice: We are very sorry, but we can do nothing for you. Thirty years ago judgment was given against you, and you now ask the Court to reverse that judgment. We cannot do it.

The applicant said the judgment was given on false evidence.

The Chief Justice said he should have applied at once, and had the witnesses punished for perjury.

Mr. W. A. Fairbridge explained the circumstances under which the judgment of 1864 was given, and the subsequent action of the applicant.

The application was refused.

THEUNISSEN V. VAN RENSBURG. { 1894. Nov. 2nd.

Mr. Innes, Q.C., applied for the issue of a writ for the personal attachment of the respondent for contempt of Court, by having wholly failed to comply with an order of the Supreme Court, dated 16th September, 1885, whereby he was restrained from cutting wood, building a house on, and otherwise dealing with certain land adjoining Elbert's Kraal, in the district of Riversdale, and for an order that he pay the costs of this application.

Mr. Jones appeared for the respondent, not to oppose the application, but to admit the contempt of Court, apologise, and throw himself on the mercy of the Court.

The Chief Justice: It must be understood that it will be the last apology that will be accepted.

Mr. Jones said the respondent's position was that he had done no damage to the land, and had not acted maliciously in any respect. He had gone upon the land to build a reed hut for temporary purposes.

Mr. Innes said that if the respondent undertook to obey the order of the Court as it stood the application would not be pressed, but he submitted they were entitled to the costs.

The Chief Justice informed the respondent that if he had any claim he should bring an action, but while the order of the Court stood he must obey it.

The applicant promised to do so.

The Chief Justice: The Court will make no order at present—but the applicant will have his costs—upon the respondent by his counsel undertaking not to continue the contempt of Court.

ROOS V. RESIDENT MAGISTRATE OF ROBERTSON. { 1894. Nov. 2nd.

Agent—Removal or suspension of—Appeal—Notice to Attorney-General.

Where an order of a Resident Magistrate's Court for the removal or suspension of an agent is brought in review under the 37th section of Act 20 of 1856, notice of the appeal should be given to the Attorney-General.

This was an application for review of the proceedings instituted by the Resident Magistrate of Robertson, under section 37 of Act 20 of 1856, which resulted in the name of the said Roos being struck off the roll of practitioners of the said Court, by reason of certain charges of professional misconduct proved against him.

There was no appearance on behalf of the applicant.

Mr. Schreiner, Q.C., A.G., raised the question as to the position of the Attorney-General in cases of this kind in order to have the practice determined. This, he said, was not a criminal review, but one affecting status. In the previous case of *Roos* v. *Resident Magistrate of Caledon* (reported in 3 Sheil, 1), the Attorney-General was allowed by the Court to appear. It would very much hamper the position of the Crown, and also that of the parties, not to know what the position of the Attorney-General was in such cases. He suggested that if the Supreme Court thought fit they should send the papers to the Attorney-General, who would appear at their request.

The Chief Justice said: The Court sees no reason for a departure from the practice which has hitherto obtained. In every case, within my recollection, brought in review notice has been given to the Attorney-General in order that he may, if he thinks proper, appear to support the Resident Magistrate's order for the removal or suspension of the agent. We cannot of course compel the Attorney-General to

appear, but we consider that, in the interests of the due administration of justice, he ought to have notice.

The motion was struck off the list on the application of the Attorney-General, as there was no appearance for the applicant.

HOME v. THE CONSERVATOR OF FORESTS. { 1894. Nov. 2nd.

Trees — Act 28 of 1888 — Summons — Evidence — *Onus probandi* — Sanction of Commissioner — Regulation — *Ultra vires.*

The 13th section of Act 28 of 1888 places under the control of the Commissioner of Crown Lands "trees planted on roadsides not being private property," *and authorises the Commissioner to make regulations for their protection under such penalty as may thereby be provided.*

A summons for a contravention of a regulation so made is not bad merely because it omits to state that the previous sanction of the Commissioner to the cutting down of such trees had not been obtained, if the summons specifies the regulation and otherwise indicates the exact nature of the charge.

If the question whether such previous sanction has been given is peculiarly within the knowledge of the defendant, very slight prima-facie evidence of the absence of such sanction is sufficient to shift the burden of proof from the prosecutor to the defendant.

The "trees on roadsides" *contemplated by the Act are trees which serve to protect the roads in question from the action of the sun, wind, or rain*

A regulation, if authorised by the Act, must be obeyed even though it be deemed to be unreasonable.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Worcester.

The appellant was charged with having on the 28th day of February, 1894, wrongfully and unlawfully contravened section 21 of Government Notice 504 of 1889, in that he did on the said day cut down and remove certain trees growing alongside the public road, not being private property, in the town of Worcester.

Regulation 21 is as follows: No such trees as aforesaid, and no trees on roadsides, not being private property, whether vested in any Divisional Council, Municipality, or other body or not, shall be cut down, removed, topped, pruned, or transplanted without the previous sanction of the Commissioner, obtained by application in writing through the Conservator of Forests, and then only in such manner as may be approved, and in case of trees on roadsides as aforesaid one month's previous notice of the application shall be given by advertisement in not less than three issues of a newspaper having local circulation.

Before pleading, the defendant's agent objected to the prosecutor (the Conservator of Forests, whose power was put in by the prosecuting barrister) named and described in the summons, and the power filed on the grounds that the only one who can prosecute on behalf of Her Majesty is the Attorney-General.

For the Crown it was pointed out that section 27 of Act 28 of 1888 constitutes Conservators of Forests or officers acting as such to prosecute for offences under that Act in the Resident Magistrate's Court.

The objection was accordingly overruled.

The defendant further excepted that the facts alleged in the charge-sheet did not constitute nor disclose a contravention of section 21 of the Government Notice alluded to in the summons.

This exception was also overruled.

The defendant then pleaded not guilty, and specially that the regulations were *ultra vires*.

Municipal Regulation No. 38B allows 8 feet of ground in front of properties on Municipal property to be enclosed for the benefit of the householder, and there was evidence to show that the two bluegum trees, which had been cut and removed by the defendant, would, if they had still been standing, have come within that space.

The evidence went to show that Mr. Home knew that the trees were being cut down, and that he had been asked by the local forest officer (Mr. Birrell) if he had the sanction of the Commissioner of Crown Lands to do so. To this question Mr. Home gave no reply.

The Magistrate found the accused guilty, and imposed a fine of £5.

From this sentence the present appeal was brought.

Mr. Rose-Innes, Q.C., was heard in support of the appeal. He contended that no offence was, under the Act, disclosed in the summons or on the record. It was no offence to cut down a tree or to prune it, but it was an offence to do so without the consent of the Commissioner of Crown Lands, obtained through the Conservator of Forests. The onus rested upon the Crown to prove that the consent had not been obtained, and no evidence was led upon that point. The

prosecutor in the case was the Conservator of Forests himself. He cited the *Queen* v. *Lyons* (2 Juta, 221) and the *Queen* v. *Goldstein* (2 Juta, 164) to show that the *onus probandi* lay on the Crown. He further submitted that the regulation was unreasonable and not such as the Act contemplated. He also pointed out that there was no evidence that the appellant had cut the trees.

Mr. Watermeyer was heard on the exception to the summons and the proof of the offence.

The Court dismissed the appeal.

The Chief Justice said: The chief objection taken on behalf of the appellant is that the summons does not allege, and the prosecutor did not prove, that the trees in question had been cut down without the sanction of the Commissioner of Crown Lands. The summons charges the appellant with a wrongful and unlawful contravention of a particular regulation, in that he did on a certain day cut down and remove certain trees growing alongside the public road, not being private property, in the town of Worcester. The gist of the charge is a contravention of the regulation, and there could be no such contravention if the previous sanction of the Commissioner had been obtained. The summons would certainly have been more formal if the words "without the previous sanction of the Commissioner" had been inserted, but the absence of these words could not possibly have misled the appellant as to the exact charge which he was called upon to meet. Then it is said that the want of such sanction was not proved by the Conservator of Forests, upon whom, as prosecutor, the burden of proof lay. Mr. Innes contends that it was a matter peculiarly within the knowledge of the prosecutor whether or not the Commissioner's sanction had been given, and he relies upon the regulation which requires that the application in writing to the Commissioner should be obtained through the Conservator. The regulation does not add that the sanction shall be given through the Conservator. The sanction of the Commissioner would have been a good defence to the appellant, in whatever manner given, and the fact of such a sanction having been given would certainly be more peculiarly within the knowledge of the appellant than in that of the prosecutor. This being so, it required a very slight amount of evidence to shift the burden of proof from the prosecutor to the defendant. Some *prima-facie* evidence was given tending to show that the Commissioner's sanction had not been obtained. For instance, when the defendant was first charged by Mr. Birrell, an officer of the Forest Department, with not having obtained the Commissioner's consent he gave no answer. The least that could be expected from the defendant at the subsequent trial, if he had really obtained the Commissioner's consent, was that he should give some evidence of a matter which was so peculiarly within his knowledge, and in the absence of such evidence the Magistrate cannot be blamed for holding that such consent had not been given. A second objection was that the regulation, for a contravention of which the appellant was prosecuted, is *ultra vires* because unreasonable. It is clear, however, that the regulation is founded upon the Act of Parliament and does not depart by a hair's-breadth from the powers conferred by the Act. If the Act is unreasonable the Legislature must be asked to repeal it, but the Court cannot ignore a regulation, however unreasonable, if it is sanctioned by the law. The last objection is that the trees cut down were not "trees on roadsides" contemplated by the Act. During the argument I suggested as a rough and ready definition of "trees on roadsides," such trees as serve to protect the roads from the action of the sun, wind, or rain. The trees in question certainly served all these purposes, and, in my opinion, fell within the prohibition of the Act. The appeal must therefore be dismissed.

Their lordships concurred.

[Appellant's Attorney, C. C. Silberbauer; Government Attorneys, Messrs. J. & H. Reid & Nephew.]

REGINA v. DE JONG. { 1894. Nov. 2nd.

Criminal appeal—Irregularity—Waiver—Objection—Act 31 of 1892—Indecent publication—Notice of suit—Summons.

An objection to an irregularity which cannot affect the verdict at a criminal trial or otherwise prejudice the defendant in his defence, if not raised at the trial, cannot afterwards be taken on appeal.

In a summons against the proprietor of a newspaper for a contravention of section 2 of Act 31 of 1892, by selling an indecent or obscene publication, it is not necessary to set out the indecent words if they are otherwise clearly indicated by a reference to the name and date of the newspaper, and to the particular passage or passages therein which are complained of.

This was an appeal from the prosecution and conviction of the accused under the Obscene Publications Act, 1892. The accused, the proprietor of the "Worcester Advertiser," was charged before the Resident Magistrate of Worcester with the crime of contravening section 2, Act 31 of 1892, in that upon or about the 11th day of August, 1894, and at or near Worcester, the said De Jong did wrongfully and unlawfully and wilfully sell, or distribute or offer for sale or distribution, or expose or cause to be exposed to public view a certain newspaper called the "Worcester Advertiser," published in the town of Worcester, of which paper the said De Jong is the lawful proprietor or editor, and which newspaper contained an indecent publication, entitled "Teekenen des Tijds," and subscribed "Door Opmerker."

The following was the publication complained of:

TEEKENEN DES TIJDS.

Waarde vriend, heer Editeur
Hoor toch wat daar zal gebeur.
Daar was voor een tijd een school gewees,
Ik hoor het was te Hex River East.
De Gouvernant was eene Israeliet,
Ik heb haar gezien maar ken haar niet.
Zij was een meisje blank van kleur,
Met blonde haren en goed gehemeur
Haar vriendelijke lach en praat
Houdt meer dan één des avonds laat,
En door 't gepraat en die gelacht
Heeft meer dan een ook daar vernacht!
Meer dan een ging koffie drink,
En verder, zoeals gij zelf kan dink.
Eerst was het drie genoemt bij namen
Waar over ik mij waarlijk schamen,
Later nog twee hooger op
Als ook de man met de blomkool kop.
Nu zijn daar een-en-twintig man,
Die allen zijn er dadig aan:
Die pot was zeker niet van glas
Waarop dat zoo veel deksels pas.
Als die kindje een dag leef,
Die een-en-twintig vaders heef,
Magtag, dan gaat ik ook kijk,
Naar wat ver vader dat het lijk!
Ik zou het toch wil weten
Hoe dat zoo een schapie heeten,
Geef hem de naam van de A.B.C.
Dan neem hij al zijn vaders meê!
Maar alleen de letter van "J." toch niet,
Zij is in geen naam in dit gebiet.
Want zoover als ik dan hoor,
Slaat zijn moeder ijzervark oor,
Want die zal te geweldig steek,
Als men met hem in de donker spreek!
En mog dat kind een meisje wees,
Geef haar de naam van Hex River East.
Hier in Achter Hex Rivier,
Daar nam haar moeder haar plezier.
Daar loop zij als otters paar en paar
Een-en-twintig door makaar!
U dankende, heer Editeur,
Later weer als ik iets bespeur.

DOOR OPMERKER.

There was evidence to show that after the above publication appeared the Worcester Public Library and several other subscribers declined to continue their subscriptions to the paper.

Before pleading, the accused excepted to the summons, on the ground that the words in the publication alleged to be indecent and obscene were not set out, but only the title of the publication.

The accused further excepted to the summons on the grounds that it was not stated to whom the accused sold or distributed the newspaper, nor to whom he offered it for sale or distribution, nor the place where the newspaper was exposed, or caused to be exposed to public view.

The accused also excepted to the summons as being bad, and embarrassing to him, inasmuch as it was written partly in one language, and partly in another, instead of being all in one language, as provided for in law.

These exceptions having been overruled, the accused pleaded not guilty. He was found guilty, and sentenced to pay a fine of £10, or to be imprisoned for two months.

From this sentence the accused now appealed, the grounds of the appeal being: (1) That the exceptions filed of record in the Court below should have been upheld; (2) that the verdict and sentence were not justified at law, or by the evidence adduced in the Court below.

Mr. Sheil in support of the appeal: The proceedings under the Act were premature, as a month had not elapsed between the giving of notice and the institution of proceedings. (*Vide* section 6.)

The Chief Justice: Was this exception taken in the Court below?

No. But as points are frequently taken in civil cases on appeal which have not been taken in the lower Court it is submitted that the same course can be adopted in criminal cases where the liberty of the subject is at stake. See *Rex* v. *Vipond* (1 Menz., 511), and per Buchanan, J.P., H.C., in *Regina* v. *Myers* (2 Juta, 154).

In any case the first exception taken was a good one and should have been sustained, Archbold (12th ed), p. 893; *Bradlaugh* v. *The Queen* (3 Q.B.D., 607) and this notwithstanding the Imperial Statute 51 and 52 Vic., cap. 64, section 7, which only applies to libels.

This is not a libel prosecution but one under the Act. See also *Regina* v. *Myers* (2 Juta, 151),

Regina v. *Blumenthal* (2 Juta, 287) and *Regina* v. *Maglashan* (xi C.L.J., p. 217.) As to the merits, the publication is not on its face obscene, and in a criminal case like the present the construction should not be forced.

Mr. Giddy for the Crown was not called upon.

The Court dismissed the appeal.

The Chief Justice said: Several objections have been taken on appeal to the verdict in this case. The chief objection is that the suit was premature inasmuch as the summons had been served on the defendant before the expiration of the full period of one month from the time when notice in writing was given to him by the prosecutor. If this objection had been taken in the Court below the Magistrate would have been bound to allow it. But the objection was not raised, the defendant took the benefit of his chance of acquittal, and after conviction takes the objection in this Court. There are certainly irregularities which a defendant cannot, by reason of his conduct, be held to have waived, but they are such irregularities as might reasonably be held to have affected the verdict. Irregularities, for instance, which would constitute a ground of review under Ordinance 40 of 1828, would wholly invalidate the conviction even if the defendant had expressly consented to their commission. But can it be doubted that if the present defendant had given his express consent to the trial, notwithstanding that the summons was issued a few days before the expiration of the month, such consent would have been binding upon him? He appeared by his legal adviser, who strenuously defended his client but never brought to the notice of the Court below the fact that the summons had been issued a few days before the time prescribed by the Act. He must, in my opinion, be held to have waived his right to appeal in respect of an irregularity which could not possibly affect the verdict or in any other way prejudice his defence on the merits.

An objection was taken in the Court below that the summons is invalid by reason of its not setting out the words in the defendant's newspaper which are alleged to be indecent or obscene. I quite agree with the contention that the defendant was entitled to know what specific words are complained of, and that if the summons did not give him that information his objection was a good one. The argument that the Court should not allow its records to be defiled by the insertion of indecent language does not hold good, seeing that the summons would admittedly have been valid if it had repeated the language complained of. But instead of doing so the summons specifies the name of the defendant's newspaper, which contains the indecent publication, the date of the publication, the heading over the incriminated passage, and the anonymous writer's subscription beneath. The defendant could have derived no benefit from the repetition of the objectionable language which he did not obtain from a full description of it, and the second ground of appeal falls to the ground.

The material question, which was left in the background by the defendant's counsel, is whether the words are indecent. I need not repeat the doggerel, but suffice it to say that its whole tenour is somewhat indecent and some of the lines are offensively indecent. It must surely have been an oversight on the defendant's part that he admitted such stuff into his paper. I should have thought that he had been sufficiently punished, without a criminal prosecution, by the loss of so many subscribers, but the prosecutor acted within his legal right in making the charge. The appeal must be dismissed.

Their lordships concurred.

[Appellant's Attorney, C. C. Silberbauer.]

BAYES V. BEST. { 1894. Nov. 2nd. ,, 5th.

Master and servant—Contract of letting and hiring—Competition in trade with master—Misconduct.

In the absence of any express stipulation it is an implied term in a contract whereby a person lets his services for employment in any trade that he shall not enter into active competition with his master in that particular trade.

This was an appeal from a conviction of the appellant by the Assistant Resident Magistrate of Cape Town for a contravention of Act 18 of 1873, section 14, by withholding two weeks' wages due to a workman named Best, whom he had dismissed from his service. The facts are briefly these:

On the 26th April, 1893, the appellant engaged Best in England for a period of three years, with wages at 50s. a week for the first year, 55s. for the second, and 60s. for the third year of the engagement. When Best had been some time in the appellant's employment he put outside of a room which he occupied, and which was fifty or 100 yards from the appellant's shop, the following advertisement painted on a board.

"*W. Best.*"

"*Boots and shoes made to order. Repairs neatly executed. Workmanship guaranteed.*"

The appellant's attention was called to the notice board in August last, whereupon he spoke to Best about the matter. Best, however, refused to remove the board and the appellant then had the following letter written to him on the 17th August:

"Sir,—I am instructed by Messrs. J. B. Eayrs & Sons to state that they have learned with surprise that you are in the habit of working at your trade and on your own account, not only after business hours, but that you have, in short, set up in business for yourself as a boot and shoe maker, though an indentured servant in their employ. Messrs. Eayrs & Sons have no wish to be unreasonable, but it must occur to you that for such a state of things to continue is impossible, and I trust that it will not be found necessary to do more than to draw your attention in a friendly manner to the matter.—Your obedient servant, W. B. SHAW."

As this letter produced no effect Eayrs dismissed Best on the 25th August.

Best in his evidence in the Court below admitted that he did work in his spare time for firms other than the appellant's.

The Magistrate found the accused guilty and gave judgment in favour of the complainant for £5 10s. 0d., wages due for two weeks, with costs (execution to be stayed pending an appeal.)

The accused now appealed.

Mr. Innes, Q.C., in support of the appeal: The simple ground of the appeal is that although there is nothing whatever on the subject in the contract, it is, by the common law, a duty which a servant owes his employer not to injure his employer's interests, but to do what he can to further them. And if he wilfully neglects that duty, and after being warned, declares that he will continue to so neglect it, the master is justified in dismissing him.

The Chief Justice: Still, if there is nothing in the contract against his working for others in his spare time, why should he not do so?

Mr. Innes: The servant's interest would be opposed to his duty. He entered into competition with his employer.

Mr. Justice Upington asked why that was not put into the contract.

Mr. Innes said that would be assuming that in law he could carry on business in competition with his master, whereas in law he contended that the servant could not do so. He cited the cases of *Nichol* v. *Martyn* (1 and 2 Esp., 732) and *Dieringon* v. *Myer* (24 A. Rep., 415).

Mr. Justice Upington said it was a very important question. Supposing a salesman employed by Thorne & Stuttaford had a small shop in Plein-street, would he be liable to dismissal, although he served his employers faithfully during the day and there was no condition forbidding the keeping of such a shop in his agreement?

Mr. Innes said he certainly would be subject to dismissal. The man was employed to further his employer's interests, with which he then entered into competition. He could not in such circumstances render loyal service to his employer. There would be no objection to a salesman doing carpentering or bookkeeping in his spare time.

Mr. Giddy argued that the Court should rely on the broad principle of rejecting what was not included in the four corners of the contract. When a master desired the exclusive services of his employé, he should put a clause to that effect in the contract.

Curia ad vult.

Postea (November 5).

The Court delivered judgment allowing the appeal.

The Chief Justice said: For the first time in this Court the question is raised whether, in the absence of any stipulation, it is an implied term in a contract whereby a person lets his services for employment in any trade that he shall not enter into active competition with his master in that particular trade. The prosecutor was engaged as a shoe finisher by the defendant, who is a boot and shoe maker in Cape Town. The contract, which is in writing, is *silent* as to the prosecutor's right to engage in business on his own account out of working hours. He has been ready and willing to perform the work he was engaged to perform, but he has set up a business of his own, between fifty and a hundred yards from the defendant's place of business, and over his street door has placed a notice-board stating that boots and shoes are there made to order, repairs neatly executed and workmanship guaranteed. He was requested to desist from this course and upon his refusal was dismissed, whereupon he took criminal proceedings against the defendant under section 14 of Act 18 of 1873. The Court below convicted the defendant and ordered him to pay two weeks' wages, and against this judgment he has appealed.

No evidence has been given of any custom of trade, and in the absence of any special agreement as to the defendant's right to act

as he did we must fall back upon our common law relating to letting and hiring. Where land has been let for the purpose of a particular trade the *lessor* is not prevented, in the absence of special agreement, from setting up a rival trade in the neighbourhood. If, therefore, the letting of services stood in every respect on the same footing as the letting of land, there would be no need for further discussion. But included in the services which a servant lets is the personal element of fidelity to his master's interests in the particular trade or occupation to which such services are to be applied. Without express agreement this personal element cannot be eliminated from the terms of a contract of service. The servant is bound to give faithful personal service to his master, and, as a consequence, to refrain from any course of conduct the natural tendency of which must be to injure his master's trade or business. To enter into active competition with the master in the very trade for which the servant's skill and services have been engaged must in the nature of things be injurious to the master's interest, and therefore it must be held to be an implied term of the contract that such competition shall not be entered into. It is idle to contend that the prosecutor did not enter into a trade competition with his master. According to his own admission his place of business was not more than a hundred yards from that of the defendant. The notice-board solicited custom from persons passing both places of business, and the prosecutor admits that he did bootmaker's work for other persons than his master. Under these circumstances, I am of opinion that the Magistrate ought not to have convicted the defendant and that the appeal ought to be allowed.

Mr. Justice Buchanan: In concurring in this judgment I must say I certainly hold that the 14th section of Act 18 of 1873 was never intended to supply a means of testing by criminal action what should be a claim for damages. The master had reasonable and probable cause for withholding the servant's wages under the circumstances disclosed in this case. There should be faithful service rendered to the master by the servant, and it is a breach of such condition of faithful service where a servant enters into business and carries on a course of conduct which would necessarily injure the master in his business. I concur in the judgment on this principle.

Mr. Justice Upington: On the main question I have arrived at the same conclusion after some hesitation. In my opinion, limitations on industry outside the working hours of servant, are not to be encouraged, but on the other hand, as laid down in the judgment, if a servant so acts as to violate the terms, expressed or implied, of the contract with his master, he has himself to blame if afterwards he is dismissed by his master.

[Appellants' Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte DAWES.

Mr. Benjamin moved for the admission of Mr. Dawes as an attorney, the oath to be taken before the Resident Magistrate at Qumbu.

The application was granted.

HODGSON v. DU PREEZ. { 1894. Nov. 5th.

Co-executors—Right of one co-executor in his personal capacity to sue his co-executor—Exception.

Where one co-executor had charged the estate certain costs to which he was not entitled,

Held, *that his co-executor could, in his personal capacity, sue for a refund of such costs.*

This was an action for refund of costs. On or about the 17th October, 1893, plaintiff and defendant were appointed joint executors testamentary of the estate of the late F. W. P. Hoskings.

The declaration alleged that the defendant wrongfully and unlawfully claimed for work done and disbursements made as attorney on behalf of the estate £61 3s., whereas he was only entitled to £6 1s.

That thereafter the defendant collected certain moneys due to the estate, out of which moneys he wrongfully, and without the consent of the plaintiff retained the sum of £61 3s. in satisfaction of his wrongful claim.

That thereafter an account was filed with the Master, wherein the aforesaid wrongful claim of £61 3s. was reduced on taxation by the Master to the sum of £6 1s.

The plaintiff claimed that the defendant should be ordered to pay into the estate to the

joint credit of plaintiff and defendant in their capacity as executors testamentary the sum of £55 2s., alternative relief with costs.

The defendant excepted to the declaration on the grounds:

1. That the facts therein set forth show no legal cause of action.

2. That the action is brought by the plaintiff in his personal capacity, and that he is not justified in so suing with regard to the matters set forth in the declaration.

3. That the declaration is vague and embarrassing and not in proper form for any order to be made thereon.

In case the exceptions were overruled, the defendant pleaded that the work done by him and the disbursements made were done and made at the request and with the knowledge, consent, and approval of the plaintiff, and that the expenses were incurred by him *bona fide* and in the interests of the estate, and were fair and reasonable.

He admitted that he had collected certain moneys in the course of the administration of the estate, but he said that he had duly accounted for the same.

He admitted that he had filed a first account with the Master, and that he had forwarded same to the heirs in the estate.

Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

Mr. Searle, Q.C. (with him Mr. Graham), for defendant, in support of the exceptions: Plaintiff should not have sued in his personal capacity. He should have applied for the defendant's removal. The plaintiff has no personal interest in the matter. He cited *Williams on Executors* (pp. 826–7) and *Dicey on Parties to an Action* (p. 220).

Mr. Molteno (with him Mr. Webber) was not heard on the exceptions, which were overruled.

The following evidence was then given:

Charles Hunter Hodgson deposed that he was appointed jointly with Mr. Du Preez executor testamentary in the estate of the late Mr. Hoskings, bookseller, Church-street. They proceeded to wind up the estate. An arrangement was made that all moneys received should be lodged in the Bank of Africa to the credit of the estate, and all moneys drawn should be drawn by cheques in their joint names. They saw the cashier at the bank and explained this. That arrangement was not carried out. Mr. Du Preez received £150 odd for the sale of the books which were the chief effects of the estate, and only accounted for £52 odd by lodging it in the bank. A good deal of correspondence (produced) then took place between Du Preez and himself. Du Preez had employed Mr. Walker to make a notarial inventory and the cost of this was £49. The value of the estate was £650 odd. Mr. Belinfante was employed to take stock and was to have a certain commission for selling the goods. He made an inventory of the goods and was paid £11 odd. Witness paid sums received from the estate into his own account because Mr. Du Preez had not paid the money formerly received into the bank, and because he had consented that all the money should go through witness's hands. It came to his knowledge at that time that Du Preez was insolvent. Mr. Du Preez had spoken to him about employing Mr. Walker for any legal matters that might turn up, but he did not think that anything like a charge of £49 would be made. He put the matter in the hands of Mr. Syfret to frame an account (produced) which was sent back from the Master's Office, and another account framed and submitted to Du Preez.

Cross-examined: Mr. Hoskings died suddenly, he was unmarried and had no relatives here. His property was left to a sister and three brothers; two heirs lived in Australia and two in America. Mr. Du Preez communicated with them. There was in the estate a considerable stock of books, stationery, and fancy articles. He could not tell the number of books. Belinfante was employed to take stock, and paid for it. Du Preez wrote to the heirs; witness did not, and Du Preez superintended the estate just as much as he did. In the conversation he had with Du Preez respecting the employment of Mr. Walker, there was nothing whatever said about a notarial inventory. Belinfante and Thomas, a clerk to Du Preez, made the inventory. He did not know how many letters Du Preez had written to the heirs. Witness claimed some fixtures and shelving in Hoskings' shop as his property, but as objection was made by Du Preez he did not press the matter, and let them be sold for the benefit of the estate. He attended the sale, but did not tell the people there that he was going to buy his own property. When the counter was knocked down to him he said, "This is buying my own property." He had been told that two of the heirs in Australia had signed the account and the heirs in America had telegraphed their approval. He had paid moneys belonging to the estate to his own account. He did this to secure himself.

In reply to the Chief Justice, witness could not give a reason for his departing from the arrangement for lodging all moneys to a joint account.

Mr. Justice Buchanan: No matter what Du Preez had done you should have gone on paying into the joint account.

Witness said that Mr. Du Preez had consented to the change.

Edward R. Syfret gave evidence as to preparing the account.

T. B. Herold, clerk in the Master's Office, was examined with reference to the reductions made in the account in the Taxing Office.

These deductions were as follows: £3 17s. charged for filing will and death notice reduced to £1 10s., £4 4s. charged for four notarial copies of will sent to heirs reduced to £1 8s.

The sums of £1 2s., 17s. 6d., and £1 5s., letters to heirs, disallowed.

£49 17s. 6d., charged for notarial inventory, reduced to £3 3s.

Mr. Belinfante deposed that with the assistance of Mr. Thomas Mr. Du Preez's clerk, he made an inventory of the goods, the work occupying fifteen days. He saw Mr. Walker in the shop three or four times a day, staying on each occasion from five minutes to a quarter of an hour. He could not say if Mr. Walker made an inventory.

H. P. du Preez deposed that he drew up Mr. Hoskings' will, and was appointed joint executor with Mr. Hodgson. For more than a month after the death of Mr. Hoskings witness conducted the affairs of the estate, consulting with Mr. Hodgson on the more important matters only. He suggested that Mr. Walker be employed to draw up a notarial inventory, as the heirs were in foreign countries, and Mr. Hodgson consented. It was also agreed that Mr. Thomas, a clerk in his office, and Mr. Belinfante should do the work of the inventory. Witness was there day by day, and Mr. Walker was very frequently in the shop while the work was being done.

By Mr. Justice Upington: The notarial inventory is a guarantee under the hand of a notary that the inventory is a fair and correct one. Mr. Hodgson and witness had to swear that the inventory was correct. They had not examined the books on the shelves.

The Chief Justice, after examining the documents, pointed out that the notary's certificate was merely a statement that the executors had sworn before him that the inventory was correct.

Mr. Justice Upington: I should like to know whether Mr. Walker is prepared to swear that he saw all these books valued and that the value in the inventory is the value placed upon them.

In reply to further questions by the Court, the witness said that there was an arrangement that all moneys should be lodged in the joint names of the executors to the credit of the estate. He denied that it was agreed that the preliminary payments to Walker and others should be made by cheque. There was no business relations between him and Walker then, but they were now in partnership. Some of this £49, namely £34, went to witness.

By Mr. Searle: He rendered these items in an account to Mr. Hodgson on December 4, and Mr. Ruthven signed the account on behalf of Mr. Hodgson.

By the Chief Justice: Mr. Thomas was paid 10s. a day for the inventory, Mr. Walker £5 5s., and the stamps were a couple of guineas. I received the balance of the £49, as I did most of the work.

The Chief Justice: You received the difference between fifteen guineas and £49?—Yes.

Did you tell Mr. Hodgson that though it appears on the account that Walker got £49 he only got £5 5s.?—No.

Did you tell the heirs?—No. I told them the differences between myself and Mr. Hodgson.

The Chief Justice: Then what is the use of the consent given by them?

By Mr. Searle: His commission as executor would be £22. Mr. Hodgson had done little or nothing compared with the work he had done in the estate. The account was sent to the heirs and approved of by them. They consented to the different charges.

Cross-examined by Mr. Molteno: In October and November he was receiving moneys for the sale of books, and Mr. Hodgson wrote asking to square up the money received, and lodge it to the joint account.

Mr. Justice Upington: Hodgson wrote asking you to square up, and some days afterwards you draw a cheque for Walker? That was squaring up in a way.

The Chief Justice: I am rather surprised I must say at Mr. Walker being a party to this making out of an account on the face of which it appears that he got the money, whereas Mr. Du Preez got the bulk of it.

Witness: He got all the money at the time, my lord.

The Chief Justice: Yes, of course, he got it.

Mr. Attorney Standen, notary and attorney, was examined by Mr. Searle on the question of a reasonable charge for a notarial inventory. He said he had never done such work, but would not with a clerk work at it each day for £2 12s. 6d. per day. If a notary made an inventory he should personally see every article entered and valued. If witness had to do such work he would charge at least £5 5s. per diem.

Judgment was given for the plaintiff.

The Chief Justice, in giving judgment, said: At the time that the plaintiff and defendant were appointed co-executors an arrangement was made between them that all moneys

received by Mr. Du Preez should by him be paid into the credit of the joint account of both executors, and that in case any payments were made these payments should be made by the joint cheque of both executors. Now, although it appears that Du Preez's name alone is mentioned, I am of opinion that this arrangement would apply to both, that it was equally the duty of his co-executor Hodgson to abide by the same arrangement, and lodge all moneys belonging to the estate in their joint names, and that both executors should pay any account against the estate by cheques drawn in their joint names. For a time this arrangement seems to have been complied with; moneys were paid in and cheques were given. But after a time accounts were paid by Mr. Du Preez without the cheque of the co-executor. With regard to most of these no objection is raised, but to some of them objection has been made. Those items to which objection is made are items which, above all others, should have been submitted to his co-executor by Du Preez before paying them, because he was personally interested in regard to the payment of these items. Now, I need only refer to the item of £49, which in this account appears to have been paid to J. H. Walker, as notary in the account charged by him. This charge is stated to have been paid to him as a notary for notarial work. When Du Preez is examined in the box it now turns out—I don't suppose Mr. Hodgson knew it before—that Walker received only £5 5s., Mr. Du Preez's clerk £7 10s., that £2 10s. was expended for stamps, and the balance of £34 was received by Du Preez. Du Preez must have known that this was a state of facts that ought to have been communicated to Mr. Hodgson before the payment was made; and not having communicated it to Mr. Hodgson, any consent, or alleged consent, which might otherwise be implied from his conduct cannot be implied in such a case. In my opinion, it is the duty, in the first instance, of Du Preez to pay all those moneys back to the joint credit of himself and his co-executor. There has not been such a waiver of his rights, or such an acceptance by Mr. Hodgson as to bind him to abide by this account. It is said, however, and this has been made a very strong point by Mr. Searle, that Hodgson himself did not abide by this agreement, and that he has enjoyed the interest of the greater part of this estate. If Mr. Du Preez in this action had filed a claim in reconvention compelling Mr. Hodgson to pay every penny received by him to the joint credit of both executors, I should certainly have given judgment for him on the claim in reconvention. But no such claim has been made. Still, I am bound to express my regret that Mr. Hodgson did not abide by the agreement, and pay all the moneys to the account of both executors, because his security would be quite as good, for the money could not be withdrawn without his signature as well as that of Mr. Du Preez. It is not alleged that he did it with any improper motive, and I do not wish to press it. I have found in cases of this kind that the mercantile community think it quite proper to mix up trust funds with private property. The sooner that notion is done away with the better. It is the duty of everyone who deals with trust moneys to keep them distinct and separate from their own accounts, and the more so is that the duty of a merchant who is engaged in mercantile affairs. I do not say that Mr. Hodgson did it with improper motives, the more so as his co-executor was an attorney and did not object to it. Although there is no claim in reconvention, I should think that after this intimation from the Court there will be no difficulty in Mr. Hodgson's transferring any moneys which he may have to the proper account. In the present claim judgment will be given for the plaintiff with costs. I ought to refer also to the argument as to the consent of the heirs. Consent obtained under such circumstances, in my opinion, does not amount to consent at all. I think this case shows how fortunate it is that the Master's Office exercises some kind of supervision in these matters. Here are absent heirs who cannot possibly know the state of the law, and who could not possibly have known in what manner this £49 was made up, and it is fortunate that the Master did protect their interests by objecting to these items. If he had not done so the whole would probably have passed, and we should have heard no more about it.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Messrs. Du Preez & Walker.]

SEPHTON v. UYAPI. { 1894. Nov. 5th

Exception—Lease—Cession—Partnership.

Where an action for rent due under two leases had been brought by a member of a dissolved partnership, and there was no clear allegation in the declaration that the plaintiff had received cession from the lessor.

Held, *on an exception taken to the declaration, that the plaintiff was not entitled to recover*

the rent sued for unless he alleged and proved a cession to him of the lessor's right. Exception accordingly allowed but leave given to the plaintiff to amend his declaration. The question of costs to stand over.

This was an argument on certain exceptions taken to the declaration which alleged *inter alia* that the plaintiff, Charles Arthur Sephton, in the year 1890, was carrying on farming operations in partnership with his father John William Sephton and his brother Alfred William Sephton, and the partnership continued until the 29th day of April, 1892, when it was dissolved by the consent of the said partners.

That on the 4th November, 1890, the defendant verbally agreed with John Sephton to take the lease of the farm Wide Valley, in the district of Maclear, which is registered in the name of John William Sephton, for a period of five years, beginning on the 4th November, 1890, at an annual rental of £15.

That on the 11th May, 1891, the defendant verbally agreed with the plaintiff to take the lease of the farm Skiddaw, situated in Barkly East, and registered in the name of John Wm. Sephton, for a period of two years at an annual rental of £50, payable in two equal six-monthly instalments.

In pursuance of the said agreements the defendant entered upon and took possession of the said farms at the dates respectively mentioned.

6. Upon the dissolution of the partnership as aforesaid it was agreed by the said partners that the plaintiff should receive as his share of the assets of the said partnership all the rents then due, and thereafter to become due under the said leases with the defendant, and the defendant was, and is, well aware of the said agreement.

The claim was for £100 rent due and £5 2s. for a certain quantity of sheep dip.

The defendant excepted to the above paragraphs of the declaration on the grounds:

That it is not alleged that the farms Wide Valley and Skiddaw formed part of the partnership property, or that John Wm. Sephton entered into the alleged agreements for and on behalf of the partnership; that there is no allegation that the said John Wm. Sephton has duly ceded any rent due to him, or that any notice thereof was or has been given to the defendant by the said John Wm. Sephton. Wherefore the defendant prays that the said paragraphs may be expunged.

Mr. Juta, Q.C., was heard in support of the exception.

Mr Webber for the plaintiff: The exception is bad as no formal cession is necessary by our law. *Executors of Paterson* v. *Webster, Steel & Company* (1 Juta, 355). Nor is notice necessary, *Voet* (18, 4, 15). The mere bringing of the action is sufficient notice of the cession. *Sande*, Cession of Actions (2, 12, 12).

The Court upheld the exception.

The Chief Justice said: It is alleged in the declaration that the lease was made by John Sephton, the owner of the farms. Charles Sephton, however, is the plaintiff who claims the rent, and Charles Sephton, the plaintiff, is not entitled to the rent unless he alleges and proves a cession to him of the lessor's rights. The only question is whether there is such a clear and distinct statement of such cession as to make it quite clear upon the declaration that the plaintiff is entitled to the rent. Although the Court has held that it no longer insists upon trivial technicalities in pleadings, on the other hand the Court does not wish to encourage the other extreme of looseness and laxity, which would prevent the opposite party from knowing what is really the case he has to meet. In my opinion the statement of facts in this declaration is too lax. The 6th paragraph is not, in my opinion, sufficiently clear and definite. If John Sephton is lessor he ought to have ceded to the plaintiff his right to receive rents under these leases, and that should be clearly stated. We think, therefore, the exception ought to be allowed, with leave to the plaintiff to amend. As to costs, I think if the defendant had gone to trial the Court would not have given judgment against him without proof of the cession. The question of costs will stand over. The Court will be in a better position at the trial to determine who should pay the costs.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendant's Attorneys, Messrs. Findlay & Tait.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

FRAME AND MYBURGH v. BOOSE. { 1894. Nov. 6th.

Account—Balance—Action.

This was an action for the sum of £128 10s. 3d., balance of account due to the plaintiffs by the defendant in respect of certain purchases made by them on his account in terms of a certain written agreement entered into between the parties on the 3rd January, 1894.

The declaration alleged *inter alia* that the plaintiffs did on various occasions between the 3rd January and the 9th May, 1894, purchase certain goods and merchandise, and sell and deliver them to the defendant.

The defendant excepted to the declaration as being vague and embarrassing.

1. Inasmuch as it is inconsistent, since it states that the plaintiffs sue the defendant for goods sold and delivered to him at his special instance and request, and also states that the plaintiffs acted as agents and brokers in the purchase of such goods from other parties for the defendant.

2. Inasmuch as the declaration is inconsistent with the agreement attached thereto, under which the plaintiffs were only entitled to purchase goods as agents or brokers for the defendant, and not to sell. Defendant is thus unable to know in what capacity the plaintiffs are suing, whether as merchants, or brokers, or agents, and the defendant is thus seriously prejudiced in his defence. (These exceptions were overruled.)

On the merits the defendant pleaded that he had always been ready and willing to pay the plaintiffs their just demands on his receiving from them specified accounts and vouchers, which, he alleged, they had declined to supply, and he claimed in reconvention that the plaintiffs should be ordered to supply proper accounts supported by vouchers, a full and free discharge of all liabilities in connection with the agreement, and cancellation of the same.

Mr. Jones appeared for the plaintiffs and Mr. McLachlan for the defendant.

In overruling the exceptions, the Chief Justice said: The declaration does not appear to me to be in the least embarrassing. If there is anything embarrassing at all, it is the contract, and to the contract the defendant was a party as well as the plaintiff. I think the declaration would have been as good without the words "and sell" in the second paragraph; but it does not follow that it is bad with these words. It seems to me to be a very paltry exception and must be disallowed.

Evidence was then taken.

Peter Myburgh, one of the plaintiffs, deposed that his firm entered into an agreement with the defendant for supplying certain goods. They were to receive the discount allowed by the merchants and shopkeepers from whom the goods were bought. The defendant was living on Table Mountain, and sometimes brought the orders himself, posting them on other occasions. Statements of account were rendered to the defendant at various times, and when defendant visited their office, which was frequently, he went through the invoices. He was fairly regular in paying his accounts up to March 21. He never complained that the accounts were inaccurate.

By the Court: When plaintiffs did not pay cash they became the debtors, not Boosé. They did not represent themselves as Boosé's agents.

By Mr. Jones: They failed to get a settlement from defendant, and a summons was issued on May 21. Negotiations for a settlement were carried on by Mr. Rudolph Myburgh, but nothing resulted.

By Mr. MacLachlan: The firm of Frame & Myburgh was now dissolved for private reasons. Defendant never asked him to get things which he did not go and get. The stipulation was that they were to buy in the cheapest market, provided the stuff was good. They got 6 per cent. discount from one firm. He was a licensed broker. At first, before buying he went round to the merchants, and ascertained the prices. Afterwards he did not do so.

Alexander K. Frame, one of the plaintiffs, deposed that he was a partner with Mr. Myburgh at the time of the contract with Mr. Boosé. He furnished the accounts to the defendant, who never asked for the invoices. He inspected them regularly, and was perfectly satisfied. He was aware that they were getting 6 per cent. discount from Sellar Bros.

Rudolph Myburgh, shipping and commission agent, deposed that he knew in July of the dispute between plaintiffs and defendant, after the summons was issued. At the request of Mr. Boosé's attorney, he examined the accounts and invoices, and found everything perfectly correct. He reported it to the attorney, and also to Mr. Boosé. Boosé suggested that he should settle the matter by paying £25 a month, but the plaintiffs would not agree, asking £30 a month for the first two instalments. Boose demurred

at first, but afterwards agreed. He never promised that the defendant should have the original invoices, but said he could get copies of them at Frame & Myburgh's.

Cross-examined by Mr. McLachlan: He knew cases in which 7½ per cent. discount was allowed. Mr. Boosé agreed to pay the money if the invoices were found correct.

Frederick Henry Boosé, defendant, deposed that he was contractor for the supply of goods to the workmen on Table Mountain. He entered in an arrangement with the plaintiffs to purchase goods for him in the cheapest market, their remuneration to be the discount allowed by the shopkeepers.

By the Court: They would never show him the invoices in their office. That was the cause of the dispute.

By Mr. McLachlan: Mr. Rudolph Myburgh approached him and offered to take over the contract from Frame & Myburgh, who owed him, he said, some money, and asked defendant to pay the money due to them into his hands. He offered to pay £25 a month, and was surprised next day to receive a letter stating that his offer had been submitted to Messrs. Frame & Myburgh. He had made no offer to the plaintiffs; his arrangement being with Mr. Rudolph Myburgh only. The usual rate of discount was 5 per cent. He always got proper invoices except from Frame & Myburgh.

By Mr. Jones: He did not agree that Mr. Rudolph Myburgh should examine the invoices on his behalf, and if they were found correct by him, that the account would be paid. He had never seen the invoices. He went frequently to the office to give orders, and asked to see his invoices, but they always refused to show them.

The Chief Justice: Do you now seriously state that they refused to let you inspect the invoices?—Yes.

Then why did you pay?—I had to pay them something, I knew I owed them money.

By the Chief Justice: They even went further, and refused to let me see my account in their ledger.

Alexander McLeod, an employé of Messrs. Walter Searle & Co., deposed that he prepared a list of the market prices of goods for several months. The list was produced. The usual trade discount was 5 per cent. Invoices were always supplied with goods.

By Mr. Jones: He did not supply any goods to Frame & Myburgh, and did not see any of the goods supplied by them to Boosé.

Mr. McLachlan was heard for the defence.

Mr. Jones, at the suggestion of the Court, abandoned the claim for brokerage.

Judgment was given for the plaintiffs.

The Chief Justice said: There is no doubt whatever in law that it is the duty of an agent to render full accounts to his principal, and in this case I am prepared also to agree that the relationship of the plaintiffs to the defendant was that of agents. I am quite willing to assent to that. When the goods were purchased by the plaintiffs and forwarded to the defendant from time to time, if the defendant on the receipt of any parcel of goods had at once wrttten to the plaintiffs saying, "You have sent me the goods, but you have not sent me the invoices. I wish to compare those invoices with the goods, and I wish to satisfy myself that you have bought them in the cheapest market," and if the plaintiffs refused to comply with this request, they would be entirely in the wrong. It would have been their duty to furnish these invoices from time to time. But the defendant was quite willing to accept the goods without invoices. From time to time he went to the office of the plaintiffs—and I am quite satisfied that the version given by the plaintiffs was quite correct—both Mr. Myburgh and Mr. Frame agreed on this point that the invoices were open to the inspection of the defendant when he came to the office. If they had refused to allow him to inspect the invoices it would have been quite competent for Mr. Boosé to say that he would put an end to the agreement, and refuse to pay until he saw the invoices. But at the time it was not a question of account. It was quite an after-thought to raise this question of invoices, and, in my opinion, the defendant had the opportunity of inspecting all these invoices, and if he was satisfied at the time with the opportunity, it would be too late afterwards for him to make it a condition precedent to paying, that copies of all the invoices should be furnished to him. At all events it is now clear, from the accounts put in, that the invoices agreed with the accounts. The plaintiffs have not claimed a penny more, except in so far as the amount for brokerage is concerned, than what is shown in the invoices. Therefore I think the plaintiffs are entitled to recover the full amount of their claim, except the amount for brokerage. The contract stipulated that the defendant should purchase from the plaintiffs only, and if he purchased from anybody else they could claim the amount due from the defendant, but it does not give them the right to claim brokerage. That amount will therefore be struck out, and the remainder of the claim will be allowed. With regard to the claim for insurance, I think that the debtor, the principal in this case, should pay the insurance premium, and also the amount for the bond. The result will be that there will

be judgment for the plaintiffs for £127 9s. 3d. with costs.

Mr. Justice Buchanan: I concur. The only question attempted to be argued in the progress of the case, was that on the receipt of the copies of the invoices there was a tender made. If this tender had been sufficient then the question of the costs might have come up for consideration, but the tender was insufficient and the defendant is not entitled to his costs.

Mr. Justice Upington also concurred.

[Plaintiff's Attorneys, Messrs. Reid & Nephew; Defendant's Attorneys, Messrs. Du Preez & Walker.]

AINSWORTH v. MOSENTHAL AND CO. — 1894. Nov. 6th.

Mr. Innes, Q.C., for the defendants, applied for a commission for the purpose of examining one Saddler in Johannesburg. The plaintiffs consented on condition that it should be an open commission, before which they might examine witnesses. The plaintiff had no objection to these terms. He suggested Mr. Advocate Auret, Johannesburg, as commissioner, and as the defendants wished an alternative, he also named Mr. Advocate Stockenstrom.

The Court made the order accordingly for a joint commission, with leave to the plaintiffs to examine such witnesses as they might produce before the commission. Mr. Advocate Auret was appointed commissioner, or in his absence Mr. Advocate Stockenstrom.

JOUBERT v. VAN DER MERWE. — 1894. Nov. 6th. Dec. 6th.

Promissory note—Denial of signature—Appeal—Remittal for further evidence.

This was an appeal from a decision of the Resident Magistrate for Tulbagh in an action in which the present respondent, plaintiff in the Court below, sued the appellant on a promissory note for £16 13s., less £6 paid on account.

The defendant, in his plea, denied having ever signed the note, alleged that he never owed the plaintiff any money whatever, and pleaded the general issue.

The plaintiff in his evidence deposed that the promissory note was signed by the defendant for the balance of an account of £34 16s. 0d. due by him to the plaintiff as the purchase price of certain sheep and goats.

The plaintiff's bookkeeper (Wannenburg) corroborated the plaintiff's evidence as to the sale of sheep and goats to the defendant and deposed that he entered the transaction in the book which he produced (book attached to the record).

The defendant in his evidence stated that in October or November, 1883, he was authorised by his wife, to whom he was married by antenuptial contract, and by certain other persons, viz., one Slabbert and one Van Wyk, to obtain certain sheep from the plaintiff and which they had purchased from him, but that he (defendant) had had no transaction whatever with the plaintiff and that he never passed the promissory note for £16 13s. 0d. sued on.

He swore that he never signed the note and that it was a forgery.

The Magistrate gave judgment for the plaintiff for the amount claimed with costs.

The defendant now appealed.

Mr. Graham in support of the appeal.

Mr. Webber for the respondent.

The Chief Justice said: Under the circumstances we think there should be a remittal of this case to the Magistrate for further evidence. It will not be necessary to hear further argument. The Court will be able to read the further evidence, and to decide without further argument unless we think it necessary. The Court will remit the case to the Resident Magistrate for further evidence to be taken before him in person; first, the evidence of the defendant as to the genuineness of the two letters produced by the plaintiff in the answers to the interrogatories; secondly, the evidence of Wannenburg as to whether all the entries in the book produced by him, the entries relating to sheep and goats, were made by him. The Magistrate is requested to report whether before giving judgment his attention was directed to the difference in the signature on the two letters and the signature on the promissory note, and the different handwriting in the entries in the book produced by Wannenburg; and if not, whether, now that his attention is directed to these entries, he still adheres to his judgment.

Afterwards on the 6th December, the Magistrate having reported on the points submitted, the Court dismissed the appeal.

The Chief Justice said: This is an appeal from the decision of the Magistrate of Tulbagh. After the arguments were heard, the Court sent the case back to the Magistrate for the purpose of taking further evidence to explain some difficulties which occurred to the Court in the course of the argument. The attention of the Court was called at the time to two letters purporting to be written by the defendant the signature to which differed from the signature to the promissory note; but the defendant now admits that these two letters were not written by him, but by his stepson in his presence and on his behalf; so that difficulty is explained. The letters

further were written in his name, and he raised no objection to them, and he admits that this debt, regarding which the letters were written, was a debt which he had incurred to the plaintiff on behalf of his wife. Another difficulty was as to whether the entries in the book produced by Wannenburg had been written by him on the dates indicated. The witness Wannenburg was called before the Magistrate, and was asked to write on a separate piece of paper, and it was quite clear that his signature was the same as that in the book. The defendant admitted that the debt was incurred on behalf of his wife, and inasmuch as he authorised his stepson to use his name for the purpose of making arrangements with the plaintiff on behalf of his wife, I think these circumstances are quite sufficient to justify the Court in supporting the decision of the Magistrate. The defendant in the Court below denied his signature, and the signature is different from the signature to the warrant; but it is quite possible that the defendant authorised somebody else to write the note for him. Anyhow it is clear that the defendant is liable on the promissory note, and the Court is of opinion that the appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery Walker; Respondent's Attorney, D. Tennant, jun.]

REGINA V. SOLOMON MEYER. { 1894. Nov. 6th.

Theft—Evidence sufficient to convict—Review.

This was a case brought up for review and referred to the Attorney-General.

Mr. Giddy, for the Crown, said the prosecution took place before the Resident Magistrate at Worcester, when the accused was charged with the theft of a pig belonging to Mr. Viljoen in contravention of Act 35 of 1893. The evidence was submitted by the Resident Magistrate to the judge of the week, Mr. Justice Buchanan, who sent it to the Attorney-General, requesting whether or not he would support the conviction. He had decided to support the conviction. The evidence showed that Mr. Viljoen's pigs grazed on a certain vley. Meyers admitted on one occasion that he had killed a pig, and after the loss of the pig was discovered his premises were searched, and in his hut was found some bacon and bacon suet. He admitted the theft to a man named Gert Wittbooi, who reported this to Mr. Viljoen, and afterwards gave evidence. Meyers had a pig on another farm, but it was proved that that had been killed three weeks before. The offence was alleged to have been committed on October 5. The accused was found guilty and sentenced to three months' imprisonment.

The evidence having been read, and Mr. Giddy having been heard in support of the conviction,

The Chief Justice said: This was a case well worthy of argument, for it is by no means a clear case. The test I would apply here is whether a jury would not be justified in convicting on the evidence, or whether a judge would feel bound to tell a jury it was their duty to acquit. For my part, I should have told a jury that it was a matter in which they should exercise their own judgment. At the same time, I should advise them rather to acquit than to convict, but if they convicted I should not find fault with their verdict. If they could believe the evidence of Wittbooi—his statement of the admission made by the prisoner that he had killed a pig on the ground belonging to Viljeon, explained how he did it by striking it on the head with a kerrie or stick, and burying it in the ground until night—if they believed this evidence, they would convict. There was also evidence that some bacon or suet was found in the prisoner's possession. In order to explain this, the prisoner called his master, another Viljeon, who in his examination said: "The prisoner bought a pig from him about a year ago. The pig was at his mother's place. I know that he killed that pig three weeks ago." If the evidence of this witness stopped there it would be very strong evidence in favour of the prisoner to show that the meat found in his house was the meat of the pig which had been killed at his mother's. But in reply to the Court, the witness added: "I cannot say that that was the same pig that I sold to him a year ago." Upon the whole, therefore, we are of opinion that this is not a case in which we ought to interfere with the decision of the Magistrate, who appears to have believed the evidence given by Wittbooi.

VILJOEN V. BAS. { 1894. Nov. 6th.

Master and servant—Wrongful dismissal—Damages.

Where a servant sued his master in a Magistrate's Court for damages for wrongful dismissal, and in his evidence admitted that he had sustained no damages, and the

Magistrate, without hearing the defendant's evidence, granted absolution from the instance on the grounds that the defendant was justified in dismissing the plaintiff.

The Court, *on appeal, refused to reverse the Magistrate's decision or to remit the case for further hearing.*

This was an appeal from a judgment of the Resident Magistrate for Britstown. in an action in which the appellant was plaintiff and the respondent was defendant.

The action in the Court below was for wrongful dismissal.

The summons alleged that on 8th August, 1894, and at Britstown, the defendant engaged the plaintiff as general servant in town to superintend his servant boys, attend to his dairy, and look generally about his premises at Britstown, at a monthly wage of £2 10s.

That on or about the 29th day of August, 1894, and at Halgatsfontein, in the district of Victoria West (whither plaintiff had gone at the request of the defendant), the said defendant did wrongfully and unlawfully, and without cause, dismiss the plaintiff from his service, and did withhold the wages due to the said plaintiff.

Wherefore the plaintiff prayed that the defendant might be condemned to pay him as and for damages by him sustained the sum of £13 and costs of suit.

The defendant pleaded (1) having employed the plaintiff on 8th August, 1894, as a general servant; (2) that before the alleged wrongful dismissal the plaintiff had wrongfully misconducted himself in the discharge of his duties, and had otherwise been guilty of gross misbehaviour, that plaintiff had at divers time failed to execute his duties, and on or about the 28th and 29th August, 1894, plaintiff as a general servant refused to obey the lawful and reasonable commands of the defendant; (3) that if defendant had dismissed the plaintiff he was by law under the circumstances justified in doing so; (4) the defendant denied that the plaintiff was engaged as a manager, and stated that he was employed in every sense as a general servant; (5) the general issue.

The plaintiff's agent stated that his claim was for damages for wrongful dismissal. He admitted paragraphs 1, 4, and 5 of the plea, and joined issue on 2 and 3.

The plaintiff in his evidence admitted that he had been guilty of various acts of misconduct and disobedience, such as allowing his master's calves to get with the cows and drink their milk. His refusal to drive his master's sheep. Ill-treating his master's horses by throwing stones at them. Refusal to take his master's mule to De Aar. Taking his master's food. Embezzling money which he had received, on account of his master, for milk, and keeping his master's horses and stable dirty. He further admitted that he had sustained no damage by being dismissed, but he contended that he was entitled to wages for the twenty days during which time he had been in the defendant's service, less 16s. 3d., which he admitted that he owed the defendant, 14s. 3d. of which was money which he had received on account of his master and not handed over.

The Magistrate, without hearing the defendant's evidence, granted absolution from the instance with costs, and from this judgment the present appeal was brought.

Mr. Molteno was heard in support of the appeal.

He contended that even if no damage had been proved the Magistrate should have given judgment for the plaintiff for the amount of wages due to him at the date of his dismissal. *Nixon* v. *Blaine & Co.* (Buch. 1879, p. 217.)

Mr. Sheil for the respondent: It is difficult to see upon what grounds this appeal is based. If the summons be looked to the claim will appear to be for damages for wrongful dismissal.

The plea justifies the dismissal and raises the general issue, which is admitted by the plaintiff in his reply.

The general issue denies every material allegation in the summons, and as the general issue is admitted by the plaintiff it was really unnecessary for the Magistrate to have gone beyond the pleadings, and on the pleadings as they stand the Magistrate would have been justified in giving absolution.

The plaintiff's evidence was taken and he frankly admitted that he had sustained no damage.

There is no claim for wages in the summons and the plaintiff's agent admitted that he rested his case on the claim for damages, consequently as soon as this claim fell to the ground by reason of the plaintiff's admission that he had sustained no damage the case was at an end, and the Magistrate had no alternative but to give absolution.

After the plaintiff's evidence the justification of the dismissal could hardly be questioned.

The plaintiff admits seven or eight acts of the grossest misconduct and disobedience of lawful commands, any one of which would justify a master in dismissing his servant.

It is now however contended that the Magistrate should have given judgment for the amount of wages due to the plaintiff on the day of his dismissal.

But there was no prayer in the summons for wages and even if there had been the R.M. would have been justified in dismissing that claim.

This Court has held in the case of *Bassaramadoo* v. *Morris* (6 J., 28) that where a servant has wilfully deserted his master he is not entitled to any wages which may be due to him at the date of his desertion, and it has gone further, and held that there may be such gross misconduct on the part of the servant as to amount to desertion. It is difficult to imagine more gross conduct on the part of a servant than that admitted by the plaintiff in this case.

Mr. Molteno in reply.

The Court dismissed the appeal.

The Chief Justice said: The utmost advantage that could be obtained for the plaintiff in this case would be to remit it to the Resident Magistrate for the purpose of taking the evidence of the defendant, and it is pretty certain from the nature of the cross-examination what the nature of that evidence would be. I think it is sufficiently clear, from the evidence given by the plaintiff himself, that by a series of petty worries he placed it out of the power of his master to retain him any longer in his service. That appears to be pretty clear from his own evidence. Now, about the throwing of stones at the horses he says, "Defendant did speak to me about throwing the stones at the horses; I did throw stones at the horses." Again he said, "I remember about the 20th August having to take the mule to De Aar. . . . . I told him (defendant) I would leave it behind if it gave me too much trouble," not if it would not go, but if it gave him too much trouble. "I left the mule behind and said nothing about it to the defendant, and went to De Aar." From plaintiff's own statement it appears that he received 14s. 3d. milk money from Mr. Scott, and did not hand it to the defendant. He says, "I told defendant; apart from this I asked him for 2s., which he gave me." "Defendant spoke to me about the stable and horses being dirty; they were dirty." These are the plaintiff's own admissions. "I only claim my wages from him; that is all I can claim from him, as I have sustained no damages." In the face of these statements the Magistrate cannot be found fault with for giving absolution from the instance. I think it would have been better and safer for him to have heard the evidence of the defendant. The summons does not claim wages, but only damages for wrongful dismissal. It would be quite competent for the plaintiff to bring an action for the wages which have accrued. If the plaintiff thinks he is entitled to wages for the time he has served he can bring his action. The judgment of the Magistrate will not be disturbed, and the appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorney, Paul de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice). Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

VAN ROOI v. MYBURGH. { 1894. Nov. 7th.

Slander—Damages - Exception—Appeal.

This was an appeal from a decision of the Assistant Resident Magistrate for Maraisburg, in an action in which the present appellant (plaintiff in the Court below) sued the respondent for £20 damages for slander.

The summons alleged that the defendant did in or about the month of July last, and in the presence and hearing of Jan van Steer, Piet van Heerden, and others, speaking to the plaintiff, say unto him the following false, slanderous, malicious, and defamatory words in the Dutch language. Then followed the words complained of, which being rendered into English are as follows: "David, you now want me to come out straight with entrails, feet, and skins; look here, it goes with this skin just as it did with those above. After you had gone away when I led the dam out I found therein skins, entrails, and feet." Thereby meaning that the said plaintiff and others were guilty of having killed certain sheep at his father Albert Myburgh's farm, Rietfontein, and thrown the entrails, feet, and skins into the dam, and the persons who heard him speak so also understood him.

The defendant took five exceptions to the summons, the only material one and the only one considered by the Magistrate was the following:

(*a*) That the whole summons is vague and embarrassing, as no definite charge or accusation is alleged to have been made against the plaintiff (Folkard, p. 386.)

(*b*) That the words alleged to have been spoken do not bear out the meaning placed upon

them by the summons, as the defendant did not accuse the plaintiff of having killed any sheep nor of having thrown the skins, &c., into the dam, and therefore no allegation of theft could be imputed by the said alleged words (*Rudd* v. *De Vos*, 2 Sheil, 383; *Reddell* v. *Kearns*, 3 H.C., 98.)

The Magistrate reserved this point, took evidence upon it, and upheld the exception with costs.

It appeared from the evidence, that when the defendant made use of the words complained of, the plaintiff said to him, "Do you accuse me of having killed your sheep?" when the defendant said, "No, David, I don't say so."

The plaintiff now appealed from the Magistrate's judgment.

Mr. Graham was heard in support of the appeal.

Mr. Benjamin, for the respondent, was not heard.

The Court dismissed the appeal.

The Chief Justice said: Upon the evidence given by the plaintiff himself, the Magistrate would have been quite justified in giving judgment for the defendant absolutely. Instead of that, he seems to have mixed up the evidence with the exception, which he allowed. Well, it is not for the plaintiff now to complain that the exception has been allowed instead of judgment being given against him, because judgment against the plaintiff would have placed him in an even worse position. Therefore, he appears to have no ground of complaint whatever. I have already remarked upon the words used. I admit they are capable of the meaning that the defendant suggested the plaintiff was guilty of theft. The plaintiff wanted to clear that up, and asked the defendant, "Do you mean to suggest that I stole sheep?" And the defendant replied, "No, I don't mean that." The plaintiff should have been satisfied with that retraction, and not brought this case before the Court incurring costs for the purpose of vindicating his character, which had already been vindicated by what the defendant had said. The appeal must be dismissed with costs.

[Appellant's Attorney, G. Montgomery-Walker; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

MARITZ v. PRATLY. { 1894. Nov. 7th.

Auction—Sale—*Bona-fide* mistake.

Where at a sale by public auction a purchaser bid for a mantel-piece, on which a gilt pier glass stood, under the impression that both the lots were being sold together, and immediately after he discovered that the lots were being sold separately, repudiated the purchase,

Held, *that there had been a* bona-fide *mistake as to the article sold and consequently no sale.*

This was an appeal from a decision of the Assistant Resident Magistrate of Kimberley in an action in which the present appellant, plaintiff in the Court below, sued the respondent for the sum of £15 10s., which the summons alleged the defendant owed the plaintiff; as to £13 part thereof for a certain marble mantelpiece sold by the plaintiff to the defendant for this sum on or about the 19th July, 1894, and as to the £2 10s. balance thereof for commission at the rate of 10 per cent. on £25 1s., the total price of goods sold as aforesaid (and the remainder of which price beyond the said £13 has been already paid by the defendant), and which commission is due to the plaintiff by virtue of the conditions on which such sale was made.

The defendant denied liability.

It appeared from the evidence that the plaintiff, who is an auctioneer at Kimberley, held a sale on behalf of Peach & Co. in August last. The articles were catalogued and numbered, and printed catalogues to the number of 350 were circulated. The conditions of sale, which were read before the sale, were printed and hung about the store.

The defendant attended the sale and bid for lot 1,208, which was a marble mantelpiece and grate; on this mantelpiece four other lots stood, including lot 1,209, a gilt pier glass.

The defendant bid for lot 1,208, under the impression that that lot and lot 1,209 were being sold together. Lot 1,208 was knocked down to the defendant, but when he discovered that lot 1,209 was not included, he immediately repudiated the purchase. The auctioneer, however, relied upon the conditions of sale and refused to put the mantelpiece up again.

Clause 3 of the conditions of sale was as follows: Purchasers must make themselves acquainted with the articles under offer, which shall, upon being knocked down to them, remain at their sole risk. The auctioneer does not hold himself liable for any defects in the articles purchased.

And clause 6 provided that to any amounts remaining unpaid after ten o'clock in the forenoon of the following day, 10 per cent. may be added for collection.

The Magistrate gave judgment for the plaintiff for £1 4s. with costs, commission on articles

sold to the defendant as to which there was no dispute, and which had not been paid for within the time referred to in clause 6 of the conditions of sale.

As to the main claim, the Magistrate found on the evidence that though the plaintiff was selling only the mantelpiece, the defendant was bidding for the mantelpiece and mirror together, that there was a misapprehension on the part of the latter, and no mutual consent between the parties as to what article was being sold, and that the contract was, therefore, not completed.

From this judgment the plaintiff now appealed.

Mr. Rose-Innes, Q.C., was heard in support of the appeal.

Mr. Juta, Q.C., for the respondent, was not called upon.

The Court dismissed the appeal.

The Chief Justice said: It appears to me that the conditions of sale have not much to say to the real question which we have to decide in this case. The question is was there a sale; because if there was a sale the amount claimed is payable, and if there was not a sale it is not payable. There cannot be a sale unless the parties agree upon the same thing. If the alleged purchaser wants to buy something else than that which the alleged seller wants to sell, there is no sale. But this is not a defence which should be easily allowed; there must be clear and definite proof of a mistake; but where the mistake is coupled with gross negligence the Court would be very loth to find that there was a mistake at all. It would require very strong evidence to hold that there was a mistake. The tendency of all courts would be to hold that negligence was no justification for a mistake. The question here is was there a mistake. The Magistrate came to the conclusion that there was, and I think it is reasonable to believe that under such circumstances there might have been a mistake. It is no unusual thing to sell a mirror together with the mantelpiece on which it stands. The defendant says he did not see the ticket upon the mirror showing it as a distinct lot from the mantelpiece, upon which there was also a ticket. I think upon the whole there was sufficient evidence to justify the Magistrate in holding that there was a *bona-fide* mistake, and that the defendant did not agree to purchase the same thing which the plaintiff was endeavouring to sell, and the Magistrate was therefore justified in deciding as he did. Then there is another point. It was not as if this mistake was discovered after the sale was over. Immediately after the article was knocked down, and as soon as the purchaser saw that this mirror was being sold separately, he at once raised this objection. There seems to me to have been no negligence, and therefore, the appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, D. Tennant, jun.; Respondent's Attorney, Messrs. Findlay & Tait.]

HAARHOFF'S TRUSTEE v. FREISLICH. { 1894. Nov. 7th.

Non-performance of duty—Damages—Proximate cause—Resident Magistrate—Messenger—Security.

The omission to perform an official duty, which is not specially owing to a person sustaining damages by reason of such omission, does not confer on him a right of action for damages unless (a) *the duty is one which has been expressly imposed by law*, (b) *the damages claimed are the proximate result of such breach, and* (c) *no other remedy is expressly provided by law in respect of such omission.*

This was an argument on an exception taken to the plaintiff's declaration, which alleged that the plaintiff sued in his capacity as sole trustee in the insolvent estate of Jan Abraham Haarhoff, and that the defendant was the Resident Magistrate at Richmond at the date of the occurrences hereinafter referred to.

That on or about the 30th January, 1894, one James Falconer Mason, who was acting messenger of the Magistrate's Court at Richmond, wrongfully and unlawfully sold in execution certain movable property belonging to the said Haarhoff, who had, on the 16th of the said month, given notice in the "Gazette" of his intention to surrender his estate upon the 30th January, and no due and proper notice was given of the said sale, in consequence whereof the said goods were sold at less than their true value.

That the said Mason thereafter wrongfully and unlawfully parted with the proceeds of the said goods, save and except a sum of £37 13s. 7d. hereinafter referred to.

That on the said 30th day of January the estate of the said Haarhoff was surrendered as insolvent, and the plaintiff was duly appointed sole trustee, which appointment was thereafter confirmed; the said Mason paid over to the plaintiff the sum of £37 13s. 7d., being a portion of the proceeds of the said sale, but failed and neglected to pay over any further sum,

Thereafter, on or about July 12, 1894, the plaintiff sued the said Mason in this Honourable Court for restoration of the said goods or their value, and obtained judgment against him for the sum of £91 0s. 0d., the value of the said goods, less £37 12s. 7d. paid as aforesaid with costs, which were duly taxed at £8 12s. 8d.

Thereafter, on or about the 28th July, 1894, the said Mason surrendered his estate as insolvent.

The defendant failed and neglected in contravention of his duty in that behalf to take sufficient or any security from the said Mason at the time of his appointment as acting messenger, or at any time, for the due fulfilment of the duties of his office, and for the due payment of moneys coming into his hands as messenger as provided by Act 20 of 1856, schedule B, rule 5, and in consequence thereof the plaintiff is unable to obtain payment of the said sum of £61 19s. 7d., or any portion thereof.

The plaintiff claimed:

(*a*) Payment of the said sum of £61 19s. 7d. as damages, with interest *a tempore moræ*.

(*b*) Alternative relief with costs.

Before pleading, the defendant excepted to the declaration on the grounds that even if the facts stated therein were true, they disclosed no ground of action against him in favour of the plaintiff. Wherefore he prayed that the declaration might be quashed with costs.

Mr. Rose-Innes, Q.C., in support of the exception: For the purposes of this argument the defendant admits the following facts:

1. That Mason acted unlawfully in selling the goods on 30th January, 1894. On 16th January, Haarhoff had given notice of his intention to surrender, Act 38 of 1884, Section 2, as amended by Act 17 of 1886, Section 11, provides that all sales in execution shall be stayed for a period of fourteen days from date of publication of notice, therefore no sale was legal until 1st February, 1894. See Act 5 of 1883, Section 6, and Ordinance 6 of 1843, Section 22.

2. That he acted illegally in parting with the proceeds.

3. That in consequence of this illegal conduct on the part of Mason the estate was deprived of certain assets and to that extent damnified.

4. That the estate has been unable to recover these damages from Mason.

5. That the defendant took no security from Mason when appointed acting messenger.

The question is whether under these circumstances the defendant is liable to the estate. The action is founded on an allegation that the Magistrate was guilty of the breach of a statutory duty. No question of false representation can posibly arise. The case therefore rests on the construction of Rule 5, Schedule B, Act 20 of 1856. Now in order to entitle the plaintiff to recover he must show (1) a breach of duty owed by the Magistrate to him and (2) that his loss was directly caused by such breach. Now Rule 5 provides that some security bond should be entered into. That would be by the messenger to the Crown, the surety to be approved of by the Magistrate, but what is there in that provision to show that the Magistrate is under any duty to the plaintiff? and unless he is the plaintiff cannot succeed. (See *Cape of Good Hope Bank* v. *Fisher* (4 Juta at p. 374), and *New Castle Water Company's Case* (2 Ex. Div., 441). The case can be tested in this way, supposing a bond had been passed could the plaintiff have sued the Government? On what ground could the action have been based? What contract was there with the plaintiff? The case of the *Tradesmen's Benefit Society* v. *Du Preez* (5 Juta, 269) cannot be extended. But even if a duty were imposed upon the Magistrate it could never have been intended to apply to a case like the present. Again what amount of security must the Magistrate take? £20, £100 or £250, the limits of his jurisdiction, and would the Magistrate be held liable if the security were not sufficient? By English law it is not every breach of a general statutory duty which will found an action for damages. *Newcastle Water Company's Case* (L.R. 2 Ex. Div. 441); *Gorris* v. *Scott* (L.R., 9 Ex., 125). See also the *Sanitary Commissioners of Gibraltar* v. *Orfila and Others* (15 App. Cas. 400). The general scope of the statutory enactment must be looked to. Under the Act in question it could never have been intended that the Magistrate should have had any personal responsibility in the matter. No form of security is specified and no limit is stated. If the Magistrate would be liable for not taking any security he would be liable for not taking enough. When the Act passed the Magistrate's jurisdiction was limited to £20, now it extends to £100 and £250 on liquid documents.

Further the damage is not the direct result of the Magistrate's breach of duty. Supposing security had been taken, it would have been in the nature of a bail bond, perhaps with sureties. The messenger would stipulate that he would duly perform his duties and in default forfeit a certain sum. That would be clearly a penal stipulation, no one could recover except the Crown, and damage would have to be proved. How could damage be proved if the Crown is not liable?

Mr. Searle, Q.C., for the plaintiff: The question at issue is one of very great importance. The object of the rule is clearly to protect the public. A magistrate is liable for non-performance of a ministerial act, *Osterloh* v. *Civil Commissioner of Caledon* (2 Searle, 240); *Cape of Good Hope Bank* v. *Fischer* (4 Juta, 386), under Rule 5 of the Schedule it was the duty of the Magistrate to have taken sufficient security from Mason.

Mr. Rose-Innes, Q.C., in reply.

The Court allowed the exception.

The Chief Justice said: I adhere to the rule as deduced in *Jordaan* v. *Worcester Municipality** from previous decisions of this Court that "where a legal duty is imposed upon and undertaken by a public body or individual, and no other remedy is expressly provided in case of non-performance, a person who, without contributory negligence, sustains damage by reason of such non-performance, is entitled to recover in the absence of proof that the duty was impossible of fulfilment." It is obvious that the rule thus laid down assumed that the duty was clearly defined by law and that the damage was the approximate result of the breach of such duty. In my judgment I referred to the duty as one which has been expressly imposed" by law and I stated the question at issue to be "whether the neglect of a clear legal duty has been brought home to the defendants." It was certainly not intended to lay down that the neglect of a purely official duty which an officer of Government owes to his superiors gives a right of action to any one of the public who has been injured thereby, although there may be no special legal duty owing to him. Upon this point I need only refer to *Cape of Good Hope Bank* v. *Fischer* (4 Juta, 368). It may well be that the defendant ought, as part of his duty to Government, to have seen that the acting messenger gave the requisite security, but the question would still remain whether it is a duty specially imposed upon the defendant by law. The 5th section of Schedule B to Act 20 of 1856 enacts that "the said messenger shall give security to the satisfaction of the Resident Magistrate for the due fulfilment of the duties of his office, and for the due and punctual payment by him, to the parties entitled thereto, of all moneys which shall come into his hands by virtue of his office." A clear legal duty is thus imposed upon the messenger to give the security. Mr. Searle would have us read the section as if it had contained further words imposing on the Magistrate the duty of seeing that security is given, but that is not the way in which legal duties would be defined by the Legislature. The duty of the Magistrate was to decide as to the sufficiency of the security offered, and unless he had refused to perform that duty he cannot be found to have been guilty of a breach of duty because he did not compel the messenger to perform his duty. My opinion being clear as to the absence of a well-defined legal duty, it becomes unnecessary to inquire whether the damage sustained by the plaintiff is not too remote a result of the alleged breach of duty to found an action upon. The exception that the facts stated in the declaration do not disclose a ground of action against the defendant must be allowed with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

* 3 Sheil, 195.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

LEWIN v. VAN DER WESTHUYZEN. { 1894. Nov. 8th.

Mr. Buchanan moved for provisional sentence for £689 upon a promissory note.

Granted.

STANDARD BANK v. HOLMBERG AND WIID.

Mr. Innes, Q.C., for the plaintiff, moved that the order for provisional sequestration be discharged.

Granted.

HARRIS v. KING'S EXECUTOR.

Mr. Searle, Q.C., applied for judgment in terms of the declaration.—The defendant was ordered to file a proper account within a month, and was declared to have forfeited all claim to his fees, and was ordered to pay the costs *de bonis propriis*.

REHABILITATIONS.

The following rehabilitations were granted on motion from the Bar: Nicholas Johannes Rossouw, jun., and Jan Spyker de Villiers.

GENERAL MOTIONS.

DOWERS v. GOODMAN.

Mr. Graham moved for leave to sue *in forma pauperis* in an action against Zeb. Goodman, for damages for breach of contract, and misrepresentation in respect of the engagement of petitioner as a mechanical dentist.

Referred to counsel.

IN THE MATTER OF THE MINOR VERDALE O. L. LEPPAN.

Mr. Molteno moved for authority to the Master of the Supreme Court to pay out from money to the credit of the minor in the Guardians' Fund the cost of his maintenance at the boarding department of the public school in connection with the Gill College, Somerset East, where he is being educated as a free scholar. The total amount in the Guardians' Fund was £88 odd. The Master reported favourably on the application.

An order was granted in terms of the Master's report.

THE CAPE OF GOOD HOPE BANK.

Mr. Innes, Q.C., applied for an order in terms of the seventh report of the official liquidators.

The order was granted as prayed, the 31st of December, 1894, being fixed as the last day on which debts could be proved.

BAATJES v. BAATJES.

Mr. Currey moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against respondent, his wife, for divorce, by reason of her alleged adultery.

The rule was made absolute.

JULIES v. MARNEWICK. { 1894. Nov. 8th. Nov. 30th.

Executor-dative—Removal.

This was an application on notice to the respondent that he would be called upon to show cause why he should not be restrained from passing transfer of certain lots of ground situate at Dysselsdorp, in the division of Oudtshoorn, registered in the name of Demas Julies (applicant's late husband), sold by the respondent at public auction, in his capacity as executor dative of the estate of the late Demas Julies, on the 29th September last, pending an action to be instituted at the next ensuing Circuit Court for setting aside the said sales and for his removal from his trust as executor dative, and why he should not be ordered to pay the costs of the application. It appeared from the affidavits that at the time of Julies' death the only debt due by the estate was an amount of £1 4s. this claim was bought or otherwise acquired by the respondent. The applicant also incurred a small debt of 6s. to him, and on being threatened with legal proceedings in default of settling the respondent's claims she sold him one lot of ground for £10.

The respondent afterwards procured his appointment as executor dative and proceeded to sell the remainder of the landed property to one King and De Beer, and hence the present proceedings.

Mr. Watermeyer for the applicant.

Mr. Searle, Q.C., for the respondent.

The Chief Justice said: It is very much to be regretted that we are not in a position now to decide finally as to the administration of this estate, and as to the sale that has been made to the men King and De Beer. We could not well make an order setting aside that sale without giving them an opportunity of coming before the Court to show cause why it should not be set aside. Nor can we set aside the appointment of the respondent as executor dative without a notice to that effect having been first given to him, and a motion brought before the Court to that effect. Unfortunately the present application is too narrow to enable the Court to deal thoroughly with the whole case. The application is for an interdict restraining transfer pending an action to be instituted at the next ensuing Circuit Court—there is no necessity for an action in the Circuit Court—for setting aside the said sale and for removal of the respondent from his trust. Upon the respondent's own affidavits, a most disgraceful state of affairs in my opinion, has been disclosed. He took advantage of this poor woman's ignorance and slight indebtedness to him to gain from her what otherwise he never would have gained. He got her to sell an erf for the purpose of paying him certain debts, and afterwards he sells the other erven to De Beer and King, and finding he could not transfer to them, got himself appointed executor dative. Upon the affidavits, the account given by the applicant is much more probable than that given by the respondent. It is not likely that the applicant would have parted with these erven, on which she lived. In my opinion, the respondent had no right to interfere in the matter. All that he has done was for his own personal purposes. The Court will grant a rule *nisi* calling

on the respondent to show cause on the last day of term why he should not be removed from his trust as executor dative, and why any sales of certain erven made by him as such executor dative should not be set aside, the rule to be served on William King and Marthinus de Beer, so as to give them an opportunity of opposing the rule being made absolute, if they are so advised; the costs up to this date to be paid by the respondent Marnewick; the rule to operate as an interdict in the meantime restraining respondent from passing transfer.*

[Applicant's Attorneys, Messrs. Fairbridge & Arderne; Respondent's Attorneys, Messrs. Tredgold & Co.]

IN THE ESTATE OF THE LATE WILLIAM J. HAWKEN.

Mr. Tredgold moved for authority to the Registrar of Deeds to allow transfer to be passed to the executor of the said estate of certain individual half-share of landed property situated in Graham's Town, taken over by him at a valuation from his brother's estate, he being the owner of the other half-share.

The application was granted, the sale being for the benefit of the minor heirs.

STEYN'S TRUSTEE v. GOUS. { 1894. Nov. 8th.

Res judicata—Plan of distribution—Plan of contribution—Confirmation of plan—Insolvent law—Costs of sequestration.

Where the free residue of an insolvent estate is insufficient to pay the cost of sequestration, the confirmation by the Court of the trustee's plan of contribution has not the effect of res judicata *as against creditors, who have proved their claims, and who are specified in such plan as being liable to contribute* pro rata *towards payment of such costs.*

This was an application on notice to the respondent that he would be called upon to show cause why a writ of execution should not be issued against him for the sum of £28 6s. 9d. (less £9 the amount of a counter-claim) recovered against him by virtue of an order confirming the first and final liquidation account and plan of contribution in the insolvent estate of Johannes Lodewicus Steyn, and why he should not be ordered to pay the costs of the writ. The facts are briefly these. Steyn's estate was surrendered on 12th January, 1893. Thereafter the applicant was appointed trustee and proceeded to liquidate the estate. The general assets did not realise sufficient to pay the costs of the liquidation, and the trustee thereupon framed and filed a contribution account among the creditors of the estate to meet the deficiency. The respondent is a concurrent creditor of the estate and duly proved his claim of £91. The applicant in his capacity is indebted to the respondent in the sum of £9, being for care of racehorses belonging to the estate and part of the expenses of administering the estate.

The account was duly confirmed on 3rd August, 1894, after lying for the inspection of creditors at the office of the R.M. of Burghersdorp and the Master of the Supreme Court for the prescribed period.

Under the contribution account the respondent was liable for £28 6s. 9d., his *pro rata* share of the expenses.

The respondent in his affidavit alleged *inter alia* that in May, 1893, he was informed that the applicant intended to institute certain prosecutions and actions at law in connection with the dealings of the insolvent, and fearing that he (respondent) would be called upon to contribute to the costs of such proceedings he interviewed the applicant and informed him of his (respondent's) desire to withdraw his claim against the estate.

That thereupon the applicant dissuaded him from his intention and asked him (respondent) to guarantee the sum of £20 against the costs of the proceedings. That the respondent declined to become a guarantor but offered to pay the applicant the sum of £20 on condition that the respondent would under no circumstances whatever be called upon to contribute any further sum towards such costs.

That the applicant agreed to accept the said sum of £20 on the said condition and thereupon the respondent paid the £20.

The respondent further alleged that some of the expenses incurred by the trustee were unnecessary and that he was indebted to the respondent in the sum of £31 15s. 3d. Under these and other circumstances set forth in his affidavit the respondent contended that the trustee had no claim on him.

Mr. Graham for the applicant: The account having been confirmed by the Court is *res judicata* as against the respondent. The 112th section of the Ordinance is wide enough to cover a contribution account. He cited *Stewart's Assignee* v. *Wall's Trustee and Others* (3 Juta, 243) and *Re Du Plessis* (1 R., 326).

Mr. Molteno for the respondent.

* On the return day the rule was made absolute with costs against the respondent. REP.

The Chief Justice said: The question in dispute is not free from difficulty. Has the confirmation by the Court of a trustee's plan of confirmation the effect of *res judicata* as against creditors who have proved their claims upon the insolvent estate and who are specified in the plan as being liable to contribute *pro rata* towards payment of the costs of sequestration? The 108th and 109th sections of the Ordinance provide for the framing and filing of a plan of distribution of the assets of the estate among the creditors in addition to an account showing how the balance for distribution has been arrived at. Under the 112th section the confirmation of such a plan has the effect of a final judgment as against those creditors who have proved their claims and to whom dividends are awarded in respect of such claims. But what is to be the mode of procedure when there is no dividend to be distributed, but on the contrary the free residue of the estate is found to be insufficient to pay the costs of sequestration? The 8th section renders the creditors who have proved unsecured debts proportionately liable to contribute towards the deficiency, and the practice has been for the trustee to file what is called a contribution account specifying the amount payable by each of such creditors. This plan is filed with the Master as well as the account of assets and liabilities, and the Court has in more than one case confirmed such plans of contribution. The Court has indeed gone further and authorised the issue of a writ of execution against the creditor, but only in default of any objection made by him after due notice of an application for a writ. It would have been mere legal pedantry to direct the institution of a formal action against a person who raised no objection to the issue of a writ for the amount appearing on the face of the plan of contribution to be owing by him. But where, as in the present case, a *bona-fide* objection is raised to the issue of a writ, on the ground that the creditor is not liable for the claim the objection must prevail unless the confirmation of the plan of contribution amounts to *res judicata* as against him. I am unable to find any provision in the Ordinance which gives the same legal effect to the confirmation of a plan for contribution *by* creditors as the 112th section does to the confirmation of a plan for the distribution of assets *among* creditors. The 114th section gives such legal effect to the confirmation of "schemes of division" framed and filed after the confirmation of the plan of distribution, but it is as silent as the rest of the Ordinance in regard to plans of contribution. It is only by inference that such plans can be placed on the same legal footing as plans of distribution, and considering the stringent operation of the doctrine of *res judicata* the inference is one which should not be inconsiderately drawn. The plan of contribution is founded upon claims which the trustee has against creditors for the costs incurred by him in realising the assets on their behalf. He is not bound to incur costs which he has not assets in hand to pay, while on the other hand the creditors may be quite ignorant that heavy costs are being incurred on their behalf. Without a clear and unambiguous enactment to that effect I am not prepared to hold that the confirmation of the plan of contribution has the effect contended for by the trustee, and his application must therefore be refused with costs To save expense in any action the trustee may bring against the respondent, the present application may stand as a summons.

Their lordships concurred.

[Applicant's Attorney, G. Montgomery-Walker; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

THE OMARURU GOLD-MINING AND EXPLORATION COMPANY.

Mr. Juta, Q.C., applied for an order in terms of the report of the official liquidator.

The order was granted.

THE MASTER V. THERON AND VAN EEDEN'S TRUSTEE. } 1894. Nov. 8th.

THE MASTER V. SMIT AND LEO'S TRUSTEE.

THE MASTER V. STONE'S EXECUTOR.

Mr. Giddy applied to make absolute the rules *nisi* for the attachment of the persons of the respondents for contempt of Court by reason of their failure to comply with the Court's order directing them to file accounts of the administration of their respective trusts.

Mr, Juta appeared for Van Eeden's trustee, Mr. Biccard, who he alleged sent the account in time to be filed with the Master, but was unable to give vouchers, because he had erroneously debited himself with certain moneys which he had not received.

The Chief Justice said: The Court will grant a decree for attachment for contempt of Court. the decree to be executed three weeks hence, unless the Master shall certify in the meantime to the Registrar of the Court that a proper account has been filed by the respondent.

In the case of the Master v. Smit and Leo's Trustee,

The Chief Justice pointed out that the trustee Keyter ascribed his failure to file a proper

account to the default of Biccard, auctioneer, in not paying him money realised by the sale of certain assets of the estate.

The order for attachment was granted.

Mr. Justice Upington suggested that an examination of the business relations of Biccard and Keyter would be desirable.

In the case of the Master v. Stone's Executor, An order was made similar to that in the Master v. Theron and Van Eeden's Trustee.

Re BURDETT'S ESTATE.

Mr. Watermeyer moved for authority to Peter J. Blant and John Strang, two of the executors testamentary of the said estate, to act in their said capacity without the assistance of their co-executor, Thomas L. Sheard, who is reported to have left the Colony at the end of August, and has not since been heard of.

Mr. Juta, Q.C., as curator, said he intended to apply that instead of the application being granted an executor should be appointed in room of Thomas L. Sheard. He suggested the General Estate and Orphan Chamber. He applied that the matter stand over pending an application for the removal of Sheard and the appointment of a third executor.

The Chief Justice said the Court had no power to appoint a third executor.

Mr. Juta then applied for a postponement to Monday, in order to enable him to decide on a definite course.

The Chief Justice said: The Court will give a very limited order to enable the debtors upon those bonds which have been paid to get their discharge. The Court will order that the Registrar of Deeds be authorised to accept the signatures of the two petitioners for the purpose of cancelling any bonds as to which the Registrar is satisfied that the debt has been duly paid.

THE MASTER V. RUITER'S TRUSTEE.

THE MASTER V. MASTERSON'S TRUSTEE.

Mr. Giddy applied for orders requiring the respondents to file forthwith the liquidation accounts and plans of distribution in the insolvent estates referred to, and further, that they do pay the costs *de bonis propriis*.

The orders were granted.

DAWS V. MCLEOD.

Mr. Juta, Q.C., moved for an order setting aside certain rule interdicting the applicant from taking out certain letters patent from the Colonial Office pending an action to be instituted by respondent, and for an order that a bill of costs presented by the said respondent in connection with obtaining the said letters patent be taxed.

Mr. Buchanan appeared for the respondent, not to oppose the application but to oppose the granting of costs.

The application was granted, the respondent to pay the costs.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte DE KLERK. { 1894. Nov. 9th.

Mr. Graham applied for the attachment *ad fundandam jurisdictionem* of this Court of certain piece of land marked No. 123, Bergville, in the district of Tulbagh, in an action to be instituted by petitioner against one Christiaan C. Jooste by edictal citation for the recovery of the balance of a mortgage bond and interest.

The Chief Justice: Take an order for the attachment of the land mentioned in the last paragraph of the petition; also an order authorising the petitioner to sue the defendant by edictal citation, to be served personally, returnable on December 12.

VERMAAK'S EXECUTORS V. VERMAAK AND OTHERS.

Mr. Innes, Q.C., applied to make absolute the rule *nisi* for a decree of perpetual silence against the respondents in respect of certain action which the respondents allege they have against applicants in their said capacity, and which action they were ordered to institute within six weeks after service of the said rule and have failed to do.

Mr. Innes said that the defendants had filed an affidavit to support an application for a further extension of time. The plaintiffs were the executors of one Vermaak, whose children were instituted heirs under his will. The defendants were grandchildren of Vermaak, and stepped into their father's place. The will stated that it was the express desire of the testator that all debts due and owing by his children and descendants should be paid into

his estate. The executors had brought up a certain sum of money owing by the father of the defendants to the estate of the testator in accordance with the terms of the will. The defendants would not take their inheritance as assigned under the account, and would not bring their action against the plaintiffs. He would consent to an extension of time until the last day of the term on condition that the defendants pay the costs of the day and institute their action at once.

Mr. Searle, Q.C., for the defendants, urged that the costs of this application might abide the result of the action.

The Chief Justice: The Court will extend the return day of the rule until the last day of term, on condition that in the meantime the defendants pay costs of the day and bring to trial their action against the plaintiffs.

IN THE MATTER OF THE MINORS BARNARD.

Mr. Graham moved for authority to the executrix of the estate of the late Marthinus C. Barnard to dispose of, by public auction, the shares of the said minors in the farm Kruis Rivier, generally known as Vlakte Plaats, in the district of Oudtshoorn, it being for their interest that the property should be sold as a whole, and the major heirs having decided to sell their portion of the same.

The Chief Justice: We think that this application ought to be postponed until the executrix has filed an account.

THE MASTER V. TURTON'S TRUSTEE.

Mr. Giddy applied for an order requiring the respondent to forthwith file the liquidation account and plan of distribution in the insolvent estate of the said Turton, and that he do pay the costs *de bonis propriis*.

The order was granted.

ABRAHAMS V. ABRAHAMS.

Mr. Buchanan applied to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against respondent, her husband, for divorce, by reason of his alleged adultery.

The rule was made absolute.

REGINA V. MARGOLIUS. { 1894. Nov. 9th.

Criminal prosecution—Act 5 of 1879, section 25—Presiding Judge—No application to reserve point—Leave to appeal.

Where no application had been made at the trial of a prisoner before a Circuit Court for leave to reserve a point for argument before the Supreme Court,

The Court afterwards on the petition of the prisoner, the Judge who presided at the Circuit Court consenting, granted him leave to appeal.

This was an application on notice to the Attorney-General that special application would be made to the Court for leave to appeal against the conviction and sentence passed on the petitioner, Julius Margolius, at present a convict on the Breakwater.

The facts as stated in the petition are briefly these: The petitioner formerly carried on business with one Samuel Lewis, at Beaufort West, under the style or firm of Margolius, Lewis & Co. At the last Circuit Court, held at Beaufort West, he and his partner were charged with fraudulent insolvency in contravening section 70 of Ordinance 6 of 1843, and with having fraudulently embezzled, concealed, or removed part of the partnership estate with intent to defraud. There were six counts in the indictment, and the accused were found guilty on the first, second, fourth, and fifth counts. the third count was withdrawn, and on the sixth count the petitioner was acquitted. The prisoners were sentenced to two years' hard labour, and they are now serving their time on the Breakwater.

The petitioner in his petition protested against his conviction, on the ground that there was not sufficient evidence to justify the conviction, and that the conviction was not according to law, and he alleged that he was desirous of appealing against the sentence to the Supreme Court sitting as a Court of Appeal in criminal cases.

No application was made to the Circuit Court at Beaufort West, either during the trial or after the conviction, for a special entry to be made on the record, showing that the nature of the proceedings had been illegal, nor was any application made to the Circuit Judge until the Circuit reached Mossel Bay, when a special application was made.

As application had not been made at the time and place provided for by Act 5 of 1879, section 23, the learned judge merely noted the application, leaving the applicant to take such further steps as he might be advised.

The petitioner was sentenced on 13th September, 1894, and on the 26th September his attorneys were instructed to send, and did send,

a telegram to the Registrar of the Western Circuit, giving notice of the petitioner's intention to appeal.

The prayer was for special leave to appeal.

Mr. Graham and Mr. Watermeyer for the petitioner.

Mr. Giddy for the Crown.

The Chief Justice said: Without the consent of the learned judge who presided at the trial, and of the Crown, leave could not be given.

Mr. Justice Upington pointed out that no application was made to the judge before the jury had found their verdict on the evidence. He did not object that leave should be given, but it must be remembered that the case was very fully placed before the jury, who gave it very earnest attention and deliberated upon it for an hour.

Mr. Giddy said he was not instructed to object strongly on the point that notice was not given in the Court below. He objected on the merits to the application.

The Chief Justice: Do you consent to a special entry being made that there was no evidence to support a conviction in the Court below? Then the question can be argued.

Mr. Giddy declined to consent.

Mr. Graham pointed out that the entry would not bind the Crown, but would merely form a ground for argument of the question on its merits.

The Chief Justice expressed his surprise at the objection made by the Crown. The entry was only preliminary to an argument on the merits.

Mr. Giddy then withdrew his objection.

The Chief Justice said: By leave of Mr. Justice Upington, who presided at the trial, and of the Public Prosecutor, leave is given to the petitioner to appeal as if a special entry had been made in the Court below to the effect that there was no evidence to go to the jury as against the prisoner. The case can be set down any day that the Attorney-General is prepared.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

HOPE AERATED WATER COMPANY v. O'CALLAGHAN. 1894. Nov. 9th.

Monthly account—Final Account—Aerated water bottles—Deficiency—Breakages.

Where monthly accounts were rendered by an Aerated Water Comapany to a customer, and the accounts showed the number of bottles received, the number returned and the deficiency, but on paying the account no demand was made for the price of the missing bottles until the customer had closed his account, when a demand was made for the price of all the bottles which had not been returned.

Held on appeal, *that the customer was justified in considering the payment of the monthly account a final settlement, and that the company regarded the bottles which were not returned as ordinary breakages, and consequently that the company, when the customer had closed his account, were not entitled to charge for all the bottles which had not been returned.*

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town, in an action in which the present appellants, plaintiffs in the Court below, sued the respondent for certain 1,366 bottles, or their value, £17 1s. 6d.

The summons alleged that between the months of January, 1892, and April, 1893, the defendant purchased from the plaintiffs 20,730 bottles of aerated water, which were duly delivered to him. That he undertook and agreed, as he was legally bound to do, to deliver the bottles in which the aerated water was delivered when the contents had been disposed of or within a reasonable time. That the defendant had only returned 18,950 bottles and neglected and refused to restore the remaining 1,366, an allowance of 2 per cent. being made for breakages.

The defendant denied the debt.

It appeared from the evidence that the Hope Aerated Water Company was the property of, and was carried on, by one Joseph Hardwicke for some years previous to October, 1892, when he sold the business to one Delaney, from whom it was taken over in January, 1893, by Charles Frederick Crole, one of the present partners. No public notice was ever given of these changes in the business. The defendant's case was that an agreement existed between himself and Hardwicke; that he was not to be responsible for missing bottles: and that this agreement was binding on the plaintiffs.

Hardwicke, however, denied that any such agreement existed between himself and the defendant.

Several monthly accounts rendered by the plaintiffs to the defendant were put in. In these accounts there appeared in separate columns the number of bottles received, the number returned, and the balance due, but in no account rendered to the defendant, save in the one furnished immediately before the issue of summons, was any claim made for the bottles which were deficient.

The Magistrate found as a fact that such an agreement did exist between Hardwicke and the defendant. He held that the plaintiffs, when they took over the business of the company, should have formally notified the fact to the defendant and other customers, and that in the absence of such notice any special contracts entered into by Hardwicke as regards empty bottles would be binding on the plaintiffs, and he gave judgment for the defendant with costs.

From this judgment the plaintiffs now appealed,

Mr. Graham was heard in support of theap peal.

Mr. Sheil for the respondent.

The Court dismissed the appeal.

The Chief Justice said: I am inclined to think that the Magistrate took rather too wide a view of the agreement between the parties. I do not apprehend that it was intended for more than that ordinary breakages would not be charged for; and therefore if an unreasonable number of bottles were detained by the defendant, the company would, I should think, have been justified in charging for such unreasonable number. But it appears that in every monthly account rendered there was a statement of the number of bottles received, and of the number of bottles returned, and at each settlement, on the same line, appears the amount charged. Now it appears to me that that is a clear indication on the part of the company to the defendant that although these bottles had not been returned they were satisfied to treat them as ordinary breakages. That appears to be the basis on which the account was settled up to the last. Now that the account has been closed the company say they will charge the defendant the arrears of all those months during which they have not been charged. In my opinion the defendant was quite justified in believing that the payment of each account was a final settlement of all bottles not returned. It is too late now for the plaintiffs to claim for the bottles which have not been returned. The appeal must therefore be dismissed with costs.

Their lordships concurred.

[Appellants' Attorney, D. Tennant, jun.; Respondent's Attorney, W. E. Moore.]

CLEGG V. GREENE AND THE ACTING CHIEF MAGISTRATE OF GRIQUALAND EAST. | 1894. Nov. 9th.

Review—Irregularity—Appeal—Courts of Griqualand East—Jurisdiction—Refusal to exercise jurisdiction.

Under Proclamation 112 of 1879, Courts of Resident Magistrates in Griqualand East have jurisdiction in actions for damages brought by a husband against persons who have committed adultery with his wife.

The refusal by the Court of the Chief Magistrate to hear an appeal in such an action on the ground that the Magistrate's Court had no jurisdiction to entertain the action constitutes a ground for reviewing and, if necessary, setting aside the proceedings of such Court of the Chief Magistrate.

A. *having obtained judgment in the Court of the Magistrate of Matatiele for damages against* B. *for adultery with* A.'s *wife*, B. *appealed to the Court of the Chief Magistrate, who refused to hear the appeal, but reversed the judgment on the ground that the Magistrate's Court had no jurisdiction.*

Held, *that such refusal was an irregularity which constituted a ground of review.*

Proceedings accordingly set aside and case remitted to the Court of the Chief Magistrate for the hearing of the appeal.

This was the hearing of a summons for the review of certain proceedings held before the Acting Chief Magistrate of Griqualand East. The facts are these: Clegg sued his wife for divorce in the Court of the Chief Magistrate of Griqualand East and a decree was granted on the grounds of her adultery with Greene. Thereafter on the 4th April, 1894, the Acting Resident Magistrate for the district of Matatiele gave judgment, in an action in which Clegg was plaintiff and Greene was defendant, in favour of the plaintiff for the sum of £100 and costs of suit, as damages for adultery committed by Greene with plaintiff's wife. No objection to the jurisdiction of the Resident Magistrate's Court was taken by the defendant, who, however, appealed to the Court of the Chief Magistrate for Griqualand East, which appeal was set down for hearing on the 25th May, 1894.

The Acting Chief Magistrate declined to enter into the merits of the case or hear the appeal, but entered judgment for the appellant, the defendant in the Court below, with costs in both Courts. The reasons for the judgment were: (1) That the plaintiff had previously sued his wife for divorce in the Court of the Chief Magistrate, when a decree of divorce was granted, but Greene was not made a co-defendant; (2) that by section 32, Proclamation 112 of 1879, the plaintiff's claim for damages

could only have been instituted in the Court of the Chief Magistrate, and that, therefore, the Court of the Resident Magistrate of Matatiele had no jurisdiction to entertain the action against Greene for damages.

The plaintiff contended that the Chief Magistrate's judgment was bad in law, and deprived him of all remedy save an application to the Supreme Court to review the proceedings, and that the decision of the Chief Magistrate was in intent and effect to reject the legal and competent evidence tendered by the plaintiff, and that the proceedings were otherwise wholly irregular and contrary to law.

Mr. Graham for the plaintiff.

Mr. Searle, Q.C., for the defendants: The Acting Chief Magistrate may or may not have taken an erroneous view of the law, but there was no such gross irregularity on his part as is contemplated by Ordinance 40, or as would justify the present proceedings. See *Pienaar* v. *Godden* (10 Juta, 129; 3 Shiel, 120).

The Court allowed the review.

The Chief Justice said: An action was brought in the Court of the Chief Magistrate of Griqualand East by Clegg, the present appellant, against his wife for divorce on the ground of her adultery with Greene, the present respondent, a decree of divorce was granted, and thereafter the appellant brought an action in the Court of the Magistrate for Matatiele against the respondent for damages on the ground of his adultery. Evidence of the adultery having been again given, judgment for £100 damages was given against the respondent. He thereupon appealed to the Court of the Chief Magistrate, who, as he states in the record, did not enter into the merits of the case, but reversed the judgment on the sole ground that the lower Court had no jurisdiction. In the present proceedings for review two questions arise, viz., had the Magistrate's Court jurisdiction to try a case of damages for adultery? And, if it had, does the refusal of the appellate Court to hear the appeal constitute a ground for reviewing its proceedings, and, if necessary, setting the same aside? The 23rd section of the Proclamation confers the widest possible jurisdiction upon the Magistrates' Courts of the Province in all civil suits and proceedings against persons residing within its respective districts. The provisions of the 32nd section limit that jurisdiction in so far as they constitute the Chief Magistrate's Court to be the local tribunal for the decision of questions of divorce or separation. The Court below held that this section excludes the jurisdiction of the Magistrates' Courts in actions for damages for adultery. In this view the Chief Magistrate was, in my opinion, mistaken. It is true that the Supreme Court, in order to prevent collusive actions against adulterers, has always looked with disfavour upon actions for damages for adultery unless there has been a complete loss of the wife's society—see *Biocard* v. *Fryer* (9 Juta, 476)—but it has never required that with such an action shall be necessarily combined an action for divorce or separation. The two classes of actions are distinct and an exclusion of jurisdiction in the one class does not exclude jurisdiction in the other. The Magistrate's Court of Matatiele, therefore, possessed jurisdiction to entertain the appellant's claim for damages against the respondent. It did so entertain it and gave judgment for the appellant. Thereupon the respondent appealed to the Court below, with the result that the judgment obtained by the appellant was set aside, not because of any defect in the evidence, nor because of the want of any legal right, but because in the opinion of the Court below the tribunal which had legally exercised its jurisdiction possessed no such jurisdiction. Mr. Searle contends that because this was a mistaken view of the law there is no ground for reviewing the proceedings founded upon the mistake. But in most cases of irregularity of proceedings the Magistrate is led to commit it not by wilful blundering but by honest conviction as to his legal duty. The Court below deemed it to be its duty to set aside a judgment which, in its opinion, was given by a Court without the requisite jurisdiction. If such jurisdiction did not legally exist no prejudice would have been done to the appellant by the Chief Magistrate's order, but it was an absolute denial of justice to the appellant to be deprived of the benefit of a judgment of a competent Court without any inquiry into the merits of his case. He had a right to a judicial decision from the appellate Court and that right was denied to him. If the Court below after hearing the appeal had decided against the appellant upon a matter of fact or of law there would have been no appeal to this Court. But the Court below refused to hear the appeal and this refusal is, in my opinion, such an irregularity as to constitute a ground of review. The proceedings in the Chief Magistrate's Court must be set aside with the costs of review, and the case, including the question of costs in the lower Courts, must be remitted to the Court of the Chief Magistrate for the hearing of the appeal.

Mr. Justice Buchanan: I concur in this decision on the ground that the Magistrate in the Court below had jurisdiction to try this question. If the Chief Magistrate had been fully

cognisant of our law and our decisions he would not have fallen into the error which he has committed. The Magistrates' Courts Act here enables magistrates to hear actions for damages for criminal conversation, but an action for damages for criminal conversation may be brought without an action for divorce. If the Supreme Court granted a divorce, a magistrate could entertain an action by the aggrieved party for damages to the amount of his jurisdiction. In the Transkei there is no limit to magistrates' jurisdiction. This case illustrates the distinction drawn between the case in the Eastern Districts Court, of the *Graham's Town Municipality* v. *Wood* and the case of the *Prince Albert Board of Management* v. *Jooste*, but the latter case did not overrule the former.

Mr. Justice Upington: I am fully of the same opinion. From the beginning it was quite clear that there was jurisdiction in the Magistrate's Court to hear this case.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendants' Attorneys, Messrs. Van Zyl & Buissinné.]

BRIGHT AND BOULTON V. DURWOOD'S EXECUTORS. { 1894. Nov. 9th.

Promissory note—Burden of proof—Evidence—Denial of signature.

In an action against the alleged makers of a certain promissory note they pleaded a denial of their signatures, whereupon the plaintiff produced the note and closed his case.

The defendant applied for absolution from the instance, which the Magistrate refused.

Held, *that in the absence of any proof that the defendants were the makers of the note, the Magistrate ought to have absolved the defendants from the instance instead of giving judgment for the plaintiff.*

This was an appeal from a decision of the Assistant Resident Magistrate for Cape Town in an action in which the present appellants were sued by the respondents on a promissory note for £35.

The defendants denied the debt, and pleaded: (1) The general issue; (2) that the note was obtained by fraud and false pretences, and was a forgery; (3) want of consideration.

The plaintiffs put in the promissory note and closed their case, subject to the right of calling rebutting evidence, contending that the onus of proof was on the defendants.

The defendants' agent applied for absolution from the instance on the ground that there was no evidence that the signatures to the note were the signatures of the defendants or that any consideration was given for the note.

The Court refused the application. The defendants then closed their case.

Judgment was given for the plaintiffs with costs, one defendant paying the other to be absolved, the Magistrate holding that the onus of proving that the signatures were not theirs lay on the defendants.

From this judgment the defendants now appealed.

Mr. Graham was heard in support of the appeal, and submitted that when a defence of forgery was raised in an action on a promissory note the onus was thrown upon the plaintiff to prove the defendant's signature. He cited *Blake and Others* v. *Louw* (3 Sheil, 304).

The Court allowed the appeal.

The Chief Justice said: The Magistrate appears to have held that the promissory note proved itself, and that when once it was produced by the plaintiff the burden of disproving its authenticity lay upon the defendants, who had denied their signatures. There is certainly some inconvenience in a practice which makes it necessary for suitors upon liquid documents, sometimes for very small amounts, to be prepared with proof of their genuineness. The plaintiff may not know, until he appears in court, that the defendant denies his signature, but in such cases the Court would, as a matter of course, postpone the case to enable him to produce the necessary evidence. The inconvenience, however, which may sometimes arise cannot dispense with the principle that where a case is defended the burden of proving the validity of his claim lies upon the plaintiff. If a promissory note is sued upon there must be some evidence that the alleged maker or indorser, as the case might be, did really make or indorse it. If the plaintiff had received it from the alleged maker or indorser that fact would be sufficient *prima-facie* evidence of the genuineness of the signature, but evidence of such fact must be given if the defendant denies his signature. The appeal must be allowed with costs.

Their lordships concurred.

[Appellants' Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

AINSWORTH V. MOSENTHAL AND CO. { 1894. Nov. 13th.

Mr. Innes, Q.C., applied, on behalf of the plaintiffs in this action, for the substitution of one witness for another in regard to an order of Court granted a few days since for the examination on commission of one Sadler, at Johannesburg, Mr. Auret being appointed the commissioner. Since that order was granted it had been ascertained that Sadler had changed his residence from Johannesburg to Buluwayo, and counsel stated that it would be quite impossible to take his evidence there before the date on which the case was set down for trial. He, however, understood that one Joseph Myers, residing in Johannesburg, could give evidence on the same points. The application therefore was that Myers' name be substituted for Sadler's in the order. He handed in consent, endorsed by the attorney on the other side, to the substitution.

The Court granted the application.

EILENBERG V. JACOBSON. { 1894. Nov. 13th.

Mr. Tredgold applied for an order to restrain Isaac Jacobson from disposing of certain erven at Springbok. The plaintiff, counsel stated, supported the company of which defendant was a partner, and there was a balance due to him of £1,069 6s. 2d. He had been unable to collect this, and had accordingly issued summons for its recovery. The erven in question, which would form part of the assets from which plaintiff was entitled to recover, had without the plaintiff's knowledge been transferred to Isaac Jacobson, the senior partner, instead of to his firm, and the order prayed for was to restrain Jacobson from selling or otherwise disposing of the property.

Mr. Justice Upington: I think you had better get some further particulars.

The Chief Justice said that no sufficient grounds had been shown. It was not alleged that the defendant intended to dispose of the property.

Mr. Tredgold said they had reason to believe that he would do so. Jacobson, it could be shown, was not in a fit state to manage the affairs of the business. If the Court would not grant an order, he asked leave to apply again, when he would submit further grounds.

The Chief Justice: Where are the parties?

Mr. Tredgold said they were both in Cape Town.

The Chief Justice said: No sufficient grounds have been shown. If the parties are in Cape Town, notice should be served on the respondent before a fresh application is made.

BAIN V. BOTHA. { 1894. Nov. 13th.

Interpleader suit—Trespass—Cattle—Damages—Evidence of ownership.

Where a writ had been issued attaching certain cattle in satisfaction of a judgment for damages for trespass, and the defendant's brother claimed the cattle in an interpleader suit.

Held, *that as there was no satisfactory proof that the cattle were the claimant's property they were liable to attachment.*

This was an appeal from a decision of the Resident Magistrate of Wynberg in an interpleader suit brought by the present appellant, (W. G. Bain) plaintiff in the Court below, against the respondent and the plaintiff's brother, Kenneth A. Bain.

The defendants were summoned to have it determined and declared by judgment of the Court whether certain movable property, four oxen, two cows, and a calf, attached on the 28th September last, were the property of the plaintiff and not liable to attachment.

The facts are these: The cattle, which were in the possession and under the entire control of K. A. Bain, and were alleged to have been bought by him on account of his brother, W. G. Bain, but had never been delivered to the latter, trespassed on Botha's lands and did considerable damage.

In an action for damages for trespass brought by Botha against K. A. Bain, judgment was given for the plaintiff; a writ was issued, and the cattle in question were attached.

W. G. Bain then claimed the cattle, but the Magistrate in the interpleader suit held that they were liable to attachment, and gave judgment accordingly. W. G. Bain now appealed.

Mr. Graham was heard in support of the appeal.

Mr. Searle, Q.C., for the respondent, was not called on.

The Court dismissed the appeal.

The Chief Justice said: The circumstances of this case require that the clearest evidence should be forthcoming that the cattle belonged to the claimant. The Magistrate apparently

was not satisfied that the evidence was sufficient for the purpose, and it would be a most monstrous state of the law if it were otherwise, and that the judgment could be reversed without such evidence. For the trespass of the cattle an action might have been brought against the present claimant, but it was brought against the brother, and the clearest possible proof was necessary to show the claimant's ownership, so as to leave no possible doubt. No such clear proof has been given to justify this Court in reversing the Magistrate's decision, and the appeal must be dismissed with costs.

Their lordships concurred.

[Appellant's Attorney, D. Tennant, jun; Respondent's Attorneys, Messrs. Fairbridge & Arderne].

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

BENJAMIN v. BENJAMIN. { 1894. Nov. 14th.

In this case Louis Harry Benjamin sued for a divorce from his wife, and for the custody of the child of the marriage.

Mr. Graham for the plaintiff.

The defendant was in default.

Lionel Harry Benjamin deposed that he was married in London on the 23rd December, 1888. He lived happily with his wife for two years, but she then left him, and all trace of her was lost. Witness found her after three months. They subsequently came out to the Colony in May of 1894. His wife was not of sober habits. They lived together at Kimberley, where her behaviour was very bad. The child, a boy, was born on the 29th August, 1889. His wife always neglected the child. A deed of separation was drawn up the 26th May, under which witness paid his wife £2 per week regularly until he received definite proof of her misconduct. His wife wrote him from Cape Town on the 3rd August, asking for her money and stating that she had not misconducted herself. Witness replied through his solicitors, in answer to which she sent a claim through her lawyers for £10. In consequence of certain inquiries, he commenced this action, and subsequently he received a summons for £8 for maintenance. His marriage certificate was now in the hands of defendant's mother. He was married by special licence at the Vestry Hall, Hackney, London. He had sent for a copy of the certificate. Witness was manager of the New Augustine's Mill, at Kimberley. He applied for the custody of the child.

Henry George Waddilove, boarding-house keeper in Cape Town, deposed that the lady whose photograph was produced lived at his house as Mrs. Benjamin. A man named H. Hart brought her to the house. They were constantly in the same bedroom at all hours of the day and night. Hart frequently passed the night with her. She was very much addicted to drink.

The Chief Justice: Who were the witnesses to the marriage?

Mr. Graham: Thomas Rhodes and Oswald Rhodes, my lord.

The Chief Justice said that the case must stand over for further proof of the marriage. There was sufficient proof of adultery, and if the marriage certificate agreed with the names of the witnesses given that would be sufficient.

STENT v. WILLIAMS, N.O. { 1894. Nov. 14th. Nov. 15th.

Architect—Professional services—Plans and specifications—Error in levels—Claim in reconvention—Damages—Arbitration.

In an action by an architect for the balance of account due for professional services in connection with the erection of a building, the defendant admitted the debt but pleaded that the plaintiff had prepared the plans in so negligent and incomplete a manner that additional expenditure very much exceeding the plaintiff's claim had been rendered necessary, and she claimed in reconvention, by way of damages, the extra expenditure which she alleged would be necessary to complete the building.

It appeared from evidence adduced at the trial that the question of the defendant's liability to the contractors for the extra expenditure had been referred to arbitration, and that the award of the arbitrator had not yet been given.

Held, *that the defence raised to the plaintiff's claim was premature, inasmuch as the arbitrator had not given his award, and as it was still uncertain whether the defendant would be held liable to pay for the extra*

expenditure, that consequently she had as yet sustained no damage, and that her plea disclosed no defence to the plaintiff's claim.

This was an action instituted by Mr. Sydney Stent against Clementina Williams in her capacity as Superior for the time being of S. George's Home, Cape Town, for the sum of £171 16s. 2d., balance of account due in respect of professional services.

The declaration alleged that:

1. The plaintiff is an architect, residing and practising in Cape Town. The defendant is the Superior for the time being of S. George's Home, Cape Town, and is sued in her capacity as such.

2. On or about the 17th August, 1892, the defendant, through Mr. H. Gibson, duly authorised to act on her behalf, entered into a certain contract in writing with the plaintiff, contained in a letter written by the plaintiff to the said H. Gibson on the 17th August, 1892, and in a letter written by the said H. Gibson to the plaintiff on the 19th August, 1892, whereunder the plaintiff undertook to render certain services as architect to the said defendant in and about the erection of certain buildings known as S. George's Home; the said services comprised the designing and superintending the carrying out of the said Home buildings.

3. In return for the said services the defendant, through her duly authorised agent aforesaid, agreed to pay the plaintiff a commission of 5 per cent. upon expenditure for contract drawings and specifications, detail drawings, and general supervision and direction. The other terms of the said contract need not be herein referred to.

4. The defendant further agreed that the terms of payment of the said 5 per cent. commission should be as follows: One moiety of the commission, or 2½ per cent., to become due and payable on completion of contract drawings and specifications, upon the amount of the tender accepted, or failing such, upon the lowest reliable tender, or on a reasonable estimate of cost, and this amount to become payable on the signing of the contract; the remaining half of the said commission to be due and payable in instalments, at the rate of 2½ per cent., upon the value of work done at the time of the issuing of certificates for instalments to the contractor. The plaintiff craves leave to refer to the contract referred to in the declaration contained in the said two letters.

5. Thereafter the plaintiff, at the request of defendant as aforesaid, prepared the designs and specifications, and furnished them to the said defendant, and a tender for the execution of the said works, at a sum of £19,795 14s. 6d., was made to the defendant, and was accepted by her.

6. Thereafter the said works were proceeded with and the plaintiff duly performed all his duties under the said contract, and received certain payments under and in terms of the said contract amounting to the sum of £733 18s. 6d., and the plaintiff says the defendant is indebted to him in terms of the said contract in the further sum of £171 16s. 2d., due and earned by him up to the 2nd May, 1894, as will more clearly appear from the account annexed to this declaration.

7. All things have happened, all time elapsed, and all conditions been fulfilled to entitle the plaintiff to receive payment in the said sum of £171 16s. 2d., together with interest thereon from 2nd May, 1894, but the defendant wrongfully and unlawfully refuses to pay the said sum to the plaintiff.

Wherefore the plaintiff prays:

(*a*) For judgment in the said sum of £171 16s. 2d., together with interest thereon from the 2nd May, 1894.

(*b*) Alternative relief.

(*c*) Costs of suit.

The defendant in her plea admitted the contract, the terms of payment, the amount of the tender accepted, that £733 18s. 6d. had been paid to the plaintiff as commission, and that the sum of £171 16s. 2d. represents commission in respect of work done under certificates issued by the plaintiff in terms of the agreement.

Save as above she denied the allegations in paragraphs 6 and 7, and said she refused to pay the sum of £171 16s 2d. for the reason that there was a larger sum due to her by the plaintiff as hereinafter set forth.

The defendant then alleged that the plaintiff prepared the plans, sections, and drawings in connection with the work (the re-building of S. George's Home) in so negligent, improper, and incomplete a manner that a large amount of additional expenditure upon the said work is necessary in order that the contract for the erection of the buildings may be completed, the levels as shown according to the said plans, sections, and drawings were erroneous, and expenditure to the amount of £500 is necessary in and about the work of excavation and other similar work; in consequence of the above defects in the said plans, sections, and drawings, all of which have been pointed out to the plaintiff, the plaintiff is liable to pay to the defendant the said sum of £500.

The plea further alleged that the plaintiff in the course of his employment upon the said

work as architect, and in or about the month of April, 1893, gave to the contractors certain instructions with regard to the deposit of soil upon a portion of the property whereon the buildings were being erected; the said instructions were improper and incorrect, and in consequence thereof the said soil has now to be removed from the place where plaintiff directed that it should be deposited, in order that the work may be properly completed according to the contract; the costs of the said removal is the sum of £150, and the plaintiff is liable to the defendant therefore.

The defendant claimed in reconvention as damages the sum of £478 3s. 10d., being the difference between the £500 and £150 referred to above, and the sum of £171 16s. 2d. claimed by the plaintiff.

The plaintiff in his replication pleaded that the defendant was not entitled to set up any claim against him in connection with the work done under the contract by reason of the terms of the 18th clause of the general conditions relating to the specifications drawn up by the plaintiff, and referred to in paragraph 5 of the declaration.

The plaintiff admitted that, notwithstanding the exercise of all reasonable skill and diligence on his behalf, certain errors did appear in the plans and specifications prepared by him, but he denied that additional expenditure upon the works to the amount of £500 had become necessary by reason of such errors, or that any additional expenditure was necessary, for which he was liable.

The plaintiff further said that he procured a large saving to the defendant upon the contract price of the work, and enabled it to be done at a cheaper rate to the defendant than that provided for by the contract.

He denied that he had given the instructions to the contractors referred to in the plea, or that the defendant had incurred any legal liability to any person in connection with the carrying out of the work for which he was liable.

The rejoinder was general, and on these pleadings issue was joined.

The general conditions were signed by the contractors and by the Sister Superior. The 18th clause was in the following terms:

No suit or action in Court of Law shall be brought or prosecuted by either of the contracting parties against the said Sydney Stent or any other architect or clerk of works, or arbitrator to be appointed by these presents, for any act done or omitted to be done in the performance of the duties which by these presents are required to be performed or omitted to be performed by them respectively.

Mr. Graham (with him Mr. Molteno) for the plaintiff.

Mr. Sheil (with him Mr. Webber) for the defendant.

The onus being on the defendant, her witnesses were first heard.

Mr. Harry Gibson, examined by Mr. Sheil, deposed that he acted as the agent of the Sister Superior. He was treasurer and hon. secretary of the Executive Committee of the S. George's Home. Competitive designs were called for the building in 1892, and Mr. Stent's plans were accepted. In the preliminary designs the estimate of cost was found to be wrong to the extent of something like £12,000. Ultimately Mr. Stent's plans were accepted, and Mr. Scott's contract for £19,795 14s. 6d. was accepted. Mr. Harcourt Rannacles acted as clerk of the works, and was succeeded by Mr. David Arnot, who was still clerk of the works. In March, 1893, Mr. Stent left for England, and returned in the following August. About the 31st May witness first learned that a mistake had been made in the plans. A meeting was then held at Government House, at which Mr. Hitchin, Mr. Stent's *locum tenens*, was present. At that meeting Mr. Hitchin produced drawings showing how he proposed to remedy he defects in the levels. An error had been made in the levels of about 6 feet. The plan did not apply the building properly to the site. Mr. Stent's own estimate of the increase of cost thus made necessary was from £170 to £360. Mr. Stent superintended the laying of the foundation-stone. After Mr. Stent's return a meeting was held on the 7th August, 1893, and Mr. Stent promised to report on the levels. He did so on the 31st August, 1893. In that report he stated that the discrepancy occurred in the plans as applied to the site. He suggested that prison labour should be employed for the alterations necessary, and as a preliminary suggested that £100 be expended for accommodation for prisoners. This report was submitted to the committee on the 6th October, 1893, at which various resolutions were then made regarding Mr. Stent's report. One was to take counsel's opinion. On the 12th October another meeting was held at which Mr. Stent admitted he was responsible for the quantities. The contractors had complained about these as being very inaccurate. Mr. Stent also admitted that the mistake in the plans was made in his office. Early in October, 1893, Mr. Stent called upon witness with a mass of correspondence, which showed that there had been considerable friction between Mr. Stent and Mr. Scott, the contractor. The committee afterwards decided to give a separate interview

to each. At the interview with Scott, it was found that he had a claim of between £2,000 and £3,000 for errors in plans and quantities. At that time Scott had threatened to stop the works. The committee wished if possible to make a peaceful settlement, and up to that period had avoided friction with Mr. Stent. Witness's attention was called from time to time to mistakes made in the building. One was a staircase that could not be used, and another was a roof in the plans without any support.

Mr. Graham said he did not wish to burke any inquiry, but it would be manifestly unfair to Mr. Stent to spring upon him mistakes other than those specified in the plea.

Mr. Sheil said that he would be satisfied to lead evidence in support of the allegations in the plea.

Witness, continuing, said the present position of the building was that the foundation differed six feet from the plans. It was impossible to allow the building to remain as it was, as something would have to be done to protect the building, as there was danger of the foundations being washed away. They had to excavate deeper than was originally intended. They also would have to excavate round the building and build a wall to prevent the ground falling in. Mr. Scott, the contractor, had sent in a tender for putting up the wall for £426, and the estimated cost of removing soil was about £200.

Cross-examined by Mr. Graham: There was some friction between witness and Mr. Stent on a private matter in December, 1893. He was familiar with the general conditions of the contract. On Mr. Stent's advice the committee at first repudiated the contractor's claims, which had been referred to arbitration. The committee certainly hurried Mr. Stent as far as the foundation-stone was concerned, but Mr. Stent told them it would not affect the plans. There was a rapid rise in the ground behind the building, but according to the plans no retaining wall was necessary, while they now found it was. The builder would take the plans as being correct, as the wall was not shown, and would take it that it was not necessary. The errors were made in the plans. There was more excavation necessary than was shown on the plans. It would not be an error in the quantities, but in the plans.

Mr. Justice Upington: It was an error in the plans.

Mr. Graham: The plans are silent on the matter, no excavation being shown thereon.

Cross-examination continued: Altogether about £20,000, the full contract price, had been expended on the building. About £12,000 had been signed for. With the exception of the south bank the building was practically completed. He would be very much surprised to hear that the building had cost less than the original contract, even if they did not have to pay the contractor's claim owing to the errors. If Mr. Scott was unsuccessful in the arbitration, the committee would not lose a farthing. Scott stopped building owing to disagreement with Mr. Stent, but afterwards went on with the building at once on the condition that the matter was referred to arbitration.

Mr. Graham was proceeding to cross-examine on the saving alleged to have been effected by Mr. Stent——

The Chief Justice: Assuming that no mistake had been made the defendant would still have been entitled to the cheaper work.

Mr. Graham said that if the question of negligence was gone into it could be shown that a saving had actually been made on the contract price.

Mr. Justice Upington: But if no mistake had been made the saving would have been still greater.

The Chief Justice: This evidence unnecessarily complicates the case.

Witness, continuing, said he raised the question of Mr. Stent's liability to the committee on the 6th October, 1893. Mr. Stent was given notice of his liability in about April, 1894, and the committee, declined to pay him any more money. Owing to different circumstances, no action was taken for nearly a year after the mistake was discovered. Witness had authorised certain small works without the authority of Mr. Stent. As far as he was aware no large amount of excavating had been done without Mr. Stent's knowledge. The properly certified reserve for "extras" amounted to about £500. The committee had always taken up the position that they were not responsible for errors in quantities. Mr. Stent on the 5th May, 1894, suggested that the whole matter should be referred to arbitration.

Re-examined: The plan put in was the working plan. When the foundation-stone was laid the ground was not marked out for the building. Mr. Stent gave instructions to lay the foundation-stone.

George Scott deposed that his firm, W. and G. Scott, were the contractors for the building. Witness paid Mr. Stent something like £500 for taking out the quantities. The working plan in court was just as it was when it came from Mr. Stent's office. Witness discovered early in January, 1893, that an error had been made in

the levels, and called Mr. Stent's attention to it. Witness at that time did not know the full extent of the mistakes.

In answer to the Court, witness said that he did not think it would be worth while to proceed with an action against Mr. Stent. Subsequently, when the soil from the excavation accumulated too much, Mr. Stent instructed him to place it on the site that was originally intended for the laundry.

The Chief Justice: This seems to be a matter between the witness and Mr. Stent.

Mr. Sheil: But we have to pay for it.

Witness had had great experience in South Africa as a builder, but had never had such trouble with plans as with the present.

Cross-examined by Mr. Graham: I believe you had trouble with the Museum contract.

Witness: Not with the plans.

Mr. Graham: But with the quantities?

Witness: Oh, yes; that man (pointing to Mr. Stent) made out the quantities.

Witness, continuing, said he was not a member of the Builders' Association. He had heard that members of the association always insisted on guarantees as to the accuracy of quantities. He did not employ Mr. Stent to make out the quantities, but he paid Mr. Stent £500 for the quantities, in terms of the contract. He did not know that it was the custom to get the quantities guaranteed. He believed he had a conversation with Mr. Stent, in which the latter refused to guarantee the quantities. Mr. Stent himself instructed him to put the soil on the laundry site. Witness did not know at that time for certain that it was the laundry site. Had sent in a large claim, basing it on the errors in the plans and quantities. Had made bricks out of the soil excavated. The bricks were not made from the soil deposited on the laundry block. The clerk of the works laid out the foundations. He made the bricks out of the clay in order to help the committee. It was no saving to him whatever, as he had his own brickfield close by. Could not say for certain how many bricks he made from the clay excavated, but it might have been about half a million. These were made from the excavation necessitated by the errors in the plans. He had been pressing his claim against the committee until the arbitration was settled upon.

Re-examined: All witness's books regarding the contract were burnt in a recent fire. He made no allowance whatever to the committee for the soil of which he made bricks.

David Arnot, deposed that from March, 1893, he had acted as clerk of the works of St. George's Home. Had had very considerable experience at Home in similar positions on some of the most important buildings in Glasgow. He thought the extra excavations necessary, exclusive of the retaining wall necessitated by the errors, would cost £250. The retaining wall would cost £200. The heap of earth deposited on the laundry site would cost about £100 to remove; but that was included in the £250. Witness had calculated that work to the total cost of £1,287 (including the £450) would have to be done to the buildings owing to the errors. The most serious error was a mistake in the levels. The building was not safe in the present state. All the rain-water accumulated round the building, and if continued the ground floor would be undermined.

Cross-examined: The bank around the building was 5 feet 6 inches higher than it should have been according to the plans. The bank required a wall, and he would not agree with Mr. Stent if he said that it could be sloped. At first he thought Scott's claim was an absurd one, but afterwards he altered his mind. Witness was always on good terms with Stent until October, 1893. The £1,287 he had arrived at was to cover omissions in the specifications and plans. His opinion was that the committee would be liable for that amount. The matter of an error of quantities was entirely one between the architect and the builder. It would have been impossible for the builder to detect the error in the levels from the plans.

This closed the case on the claim in reconvention.

Mr. Sydney Stent deposed that he was an architect practising at Cape Town. He was a Fellow of the Institute of British Architects. Certain mistakes were made in the plans prepared for the purpose of taking out quantities. The levels were taken by a competent surveyor, and placed in the hands of a competent draughtsman. He found that the errors had occurred through different scales having been used in his office in transferring the drawings. The instructions as to depositing the waste soil had never, until that morning by Mr. Scott, been attributed to witness. They had always been attributed to the clerk of the works. One Brown offered to remove the soil for which £500 was claimed for £75. It would be possible to avoid a retaining-wall, although it might be desirable to have one. It would cost about £170, including steps, &c. Without a wall, the sum of £50 would be ample to put the bank into such a state that it would not be a source of danger to the building. Witness admitted at once that the quantities provided an insufficient amount for excavation.

Mr. Justice Buchanan: The question is who is responsible. Whether it is the contractor or Mr. Stent.

Witness, continuing, said that Scott asked him to guarantee the quantities, and he distinctly refused. He thought the committee had good value for their money. It was a very cheap building. He estimated that the extra excavation caused by the mistake would cost about £75.

Cross-examined: There was a mistake of £12,000 in the original estimate sent to the Sister Superior. Having made that initial mistake, he ought to have been particularly careful with the next plans, and he regretted that the error was repeated. He simply depended on his assistants in making the drawings, but he personally gave much thought to the building. Although the building was ten feet under the ground instead of four feet as intended, he still said that the contractor under the contract was liable, he was bound to make a clear gangway round the building of five feet wide. Still he thought the committee were morally liable, and that was why he proposed the use of convict labour in making the bank. Witness had admitted his error in applying the building to the site, and also that his quantities were incorrect.

Mr. Justice Buchanan: He says he made the mistake and that the contractor is responsible for the consequences of it.

Cross-examination continued: He was considerably hurried when he was taking out the quantities. Witness received about £500 for the work. The clerk of the works seemed to have been considered an agent of the committee and not as his agent. Witness considered his duty was done when he instructed the clerk of the works. Witness was away for several months, and he did not see the soil deposited on the laundry site. Mr. Scott was quite mistaken when he said that witness gave instructions for it to be put on the site. He gave Scott an assurance that the quantities were correct.

The Chief Justice: Of course we cannot decide in this case whether Mr. Stent is liable to Mr. Scott.

Mr. Thomas Henry Hitchin, Mr. Stent's managing assistant, deposed that he superintended the work in the absence of Mr. Stent. The plans were carefully checked; there was nothing wrong in the levels themselves. Mr. Scott came to him about the soil deposited on the laundry site, and said he was going to make a claim on the committee, and witness repudiated it. He thought Scott was a gainer by using the excavated earth for brick.

Cross-examined by Mr. Sheil: Witness took out the quantities from the pencil sketch plan. There was an indication on that sketch of the surface of the ground. That pencil sketch was the base of all the other plans. A mistake was made in the plan as to the levels of the ground. Witness was a qualified quantity surveyor. It was a special department in England, not usually done by architects, although sometimes the two professions were combined. The quantities were taken from the data afforded by the pencil plan and specifications. The original error must have been made on the pencil plan and hence the errors in the quantities.

Mr. Sheil: Mr. Stent says that he took out the quantities from his head, not from the plans or specifications.

Examination continued: The blue line appearing on the sketch and working plans was to show the level of the ground. That line was omitted from the contract plans, because it was unnecessary. He could show on the plans where provision had been made for a five-feet gangway road, mentioned by Mr. Stent. (Witness pointed out lines as showing the gangway.) The lines were not shown all round the building. The specifications also provided for this gangway. During Mr. Stent's absence witness visited the works constantly and saw the earth alleged to have been deposited on the laundry site. He saw it being deposited there. He first discovered the error in the levels on the 8th May. The mistake was first pointed out to him by the Sister Superior.

Mr. Justice Upington: She is a superior surveyor as well.

Examination continued: Witness suggested two ways of remedying the error, the one would cost about £170, the other £360. He did not consider the retaining-wall necessary for the safety of the building; they had simply to form a sloping bank. The pressure of water could be provided for without a wall. He at one time thought a retaining-wall would be necessary, but that was under a misapprehension. The bank now lying against the building he thought might not have fallen there, but put there purposely.

Mr. Sheil said it would be very desirable that an inspection of the building should be made.

Examination continued: The actual cost of the increased excavation he estimated would be about £100. This was necessitated through the error in the quantities. Did not know whether the laundry, if built according to the plans, would have been 4 feet 6 inches higher

than it is now. He was on the building once a week at least. The clerk of the works carried out his instructions very well.

This concluded the evidence for the plaintiff.

The Chief Justice: Mr. Sheil, presuming that errors were made in the plans and specifications, how has the defendant sustained damage? The matter is still under arbitration, and we cannot tell at present whether the arbitrator will admit the contractors' claim in respect of the additional excavation and other works alleged to have been necessitated by the architect's mistakes. If these questions are decided in favour of the committee, they will have sustained no damage whatever. I mention these points so that you may confine your argument to them.

Mr. Sheil then addressed the Court on the points suggested by the Chief Justice.

Mr. Graham was not called upon.

Judgment was given for the plaintiff for £171 16s. 2d., with absolution from the instance in respect to the claim in reconvention, defendant to pay the costs.

The Chief Justice said: The plaintiff claims the sum of £171 16s. 2d. for services rendered by him as architect, and the defendant admits the debt, but, by way of claim in reconvention, claims the sums of £500 and £150 as damages sustained by reason of the negligent manner in which the plaintiff is alleged to have performed his duties. The defendant clearly cannot succeed without proof of damages, and in this she has, in our opinion, failed. She has not yet been obliged to pay the contractors more than the sum agreed upon by the contract, and there is no satisfactory evidence that she can ever be called upon to pay more. There is a dispute between her and the contractors; that dispute has been referred to arbitration, but the arbitrator has not yet given his award. The contractors say that the excavations required to be made by them were in excess of the excavations provided for by their contract, but it is by no means clear that this has caused them any damage. The soil thus excavated they utilised for the purpose of making about half a million of bricks which were used on the building. The material alone must have been of considerable value to them, even if we lose sight of the saving in the transport of the bricks from elsewhere. But even if the contractors were put to increased cost, they were not entitled to recover such increased cost from the defendant without the architect's certificate, and such a certificate has never yet been obtained. The same remarks apply to the contractors' claim for additional cost in removing soil which the plaintiff is alleged to have had deposited in the wrong place. The contractors deposited it in a spot where they knew a laundry was to be placed, and could hardly recover the expense of the removal from the defendant. To both the contractors' claims against the defendant she would have had a sufficient answer that the contractors had no architect's certificate. I leave out of consideration, of course, the question whether the contractors may not have a claim against the plaintiff, as architect, in case he should improperly refuse his certificate. Nor can we import into this case the question whether the contractors have any claim against the plaintiff, in his capacity as building surveyor, for his mistake in taking out the quantities. That there has been a mistake the plaintiff candidly admits, but his case is that the mistake has not prejudiced the defendant, whatever claim the contractors, who have been misled, may have against him. In any action brought against him they would, of course, have to prove that they were misled and that they suffered actual damages in consequence. But we have now to deal with the defendant's claim for damages. If the plea had been that the plaintiff is not entitled to the fees claimed by him by reason of his negligence in the performance of his duties as architect, there might have been some arguable question to consider. But the plea admits the fees to be payable, and claims damages said to have been occasioned by reason of the plaintiff's negligence. There is no proof whatever of such damages, and in the absence of such proof the only course open to the Court is to grant absolution from the instance on the claim in reconvention. The plaintiff must have judgment with costs on his claim in convention.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Messrs. Sauer & Standen.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

SPIERS AND CO. v. BENADI. { 1894. Nov. 15th.

Mr. Graham for plaintiff. Application for provisional sentence on a mortgage bond for £247, less £47 paid on account,

to the purchase of a water erf in the village of Petrusville, and building and furnishing a house therein for the use of the aged father and mother of the heirs, subject to conditions as to the future ownership of the same.

The Court made no order.

Re MANDY'S INSOLVENT ESTATE.

Mr. Tredgold applied for the appointment of Michael Fitzgerald as provisional trustee in this estate.

Order granted.

LEONARD V. SCOTT. { 1894. Nov. 16th.

Wrongful dismissal—Salaried official—Volunteer Corps—Misconduct.

A salaried official of a Volunteer Corps, who, in the presence of members of such Corps, falsely and deliberately asserts that the officer in practical command of the Corps has been guilty of an offence which would unfit him for command and expose him to severe penalties, is guilty of misconduct for which he may be dismissed.

This was an action instituted by Mr. William Albert P. G. Leonard against Lieutenant-Colonel Scott, in his capacity as Officer Commanding the Cape Town Highlanders, for £36, £24 being for salary alleged to be due for the months of December, 1893, and January 1894, and £12 damages for wrongful dismissal.

The declaration alleged that in or about January, 1893, the plaintiff entered into an agreement with the defendant, who was at that time Major of the regiment, and was acting for and on behalf of Sir James Sivewright, the Lieutenant-Colonel, and representing the regiment, whereunder the plaintiff undertook to perform the duties and services of orderly-room clerk to the regiment at a salary of £5 per month, payable monthly, to be subsequently raised to £9 a month as soon as the plaintiff should be transferred from the Imperial Service, in which he then was. Thereafter the plaintiff was transferred, and received the said salary of £9 per month.

That in or about June, 1893, the plaintiff agreed with Scott, acting as aforesaid, to render additional services as assistant musketry-instructor to the regiment at a salary of £1 per month, payable monthly, and in August, 1893, a further agreement was entered into between the same parties, whereunder the plaintiff was appointed storekeeper to the regiment at an additional salary of £2 per month, payable monthly.

That the plaintiff was duly paid his salary, amounting in all to £12 per month, for the services above referred to up to the end of November, 1893.

That on or about January 17, 1894, the plaintiff was wrongfully and unlawfully dismissed from his above appointments, as from that date, and a notice to that effect was published by the authority of the defendant, acting as Lieutenant-Colonel commanding the regiment at that date.

There was then an allegation that the plaintiff had duly performed all services and duties required of him under the agreements referred to above, and he claimed:

(*a*) The sum of £24, being salary for the months of December, 1893, and January, 1894.

(*b*) £12 damages for wrongful dismissal, reckoned at the amount of one month's salary.

(*c*) Alternative relief and costs.

The defendant pleaded that before issue of summons he had tendered the plaintiff £6, being for services rendered by him between the last day of November and 13th December.

The defendant further said that on 13th Dec. the plaintiff was suspended, and thereafter, on the 30th December, he was dismissed. He (defendant), however, denied that the dismissal was wrongful or unlawful.

The defendant specially said that at the date of the agreements and thereafter the plaintiff was a staff-sergeant in the Cape Town Highlanders, and as such a duly enrolled Volunteer, enrolled under and subject to the provisions of Act 32 of 1892.

That the duties of orderly-room clerk, assistant-instructor of musketry, and storekeeper were performed by the plaintiff in his capacity as staff-sergeant of the regiment.

That whilst acting in such capacity the plaintiff was charged before a properly constituted Court of Inquiry, assembled under the provisions of Act 32 of 1892, on or about December 13, 1893, with (*a*) having made statements concerning his superior officer prejudicial to good order and discipline; (*b*) with inciting members of the corps to depose Major Scott, an officer of the regiment, and evidence was taken concerning the charge against the plaintiff.

That thereafter the plaintiff in respect of the said charges, on or about 30th December, 1893, was reduced to the ranks and dismissed from the regiment by the Lieutenant-Colonel commanding.

That thereafter the plaintiff appealed against the decision of the Lieutenant-Colonel commanding the regiment to the Colonial Military

Secretary, who declined to disturb the decision of the Lieutenant-Colonel commanding the Cape Town Highlanders.

The plaintiff in his replication said that he had been summoned before certain officers purporting to constitute a Court of Inquiry, but he specially denied that a properly constituted Court of Inquiry was assembled under the provisions of Act 32 of 1892.

Issued was joined on these pleadings.

Mr. Searle, Q.C. (with him Mr. Molteno), for plaintiff.

Mr. Graham (with him Mr. Benjamin) for defendants.

An amendment of the summons was asked for by substituting Lieutenant-Colonel Scott's name for that of Sir James Sivewright, to whom it was originally addressed as Colonel of the regiment.

The defendant consented, and the amendment was allowed.

Mr. William Albert Patrick Glyn Leonard, the plaintiff, deposed that he was formerly a sergeant in the East York Regiment. He afterwards, on 20th January, 1893, became orderly-room clerk to the Cape Town Highlanders. Subsequently he also became assistant musketry-instructor and storekeeper. He took a great interest in the corps and tried very hard to work it up. There was no complaint made as to the way he performed his duties. On December 13, 1893, he met the acting adjutant, Lieutenant Brown, who told him he would have to appear before a Court of Inquiry in reference to something he had said about Major Scott—that he had accused Major Scott of importing goods into the Colony under the cloak of Volunteering to escape paying duty. Witness had accused Scott of this on the 11th December in a private office in the presence of several others, some of whom were Volunteers. The charges brought against witness at the Court of Inquiry on the 18th December were accusing Major Scott of importing goods into the Colony under wrongful representation. (Records of the Court of Inquiry were put in.) Witness pleaded guilty to that charge. He was also charged at the inquiry with having accused Major Scott of misrepresentations to the Colonial Government on the subject of the capitation grant and of conspiring to depose Major Scott from the command of the regiment. He had no notice of these latter charges.

The Chief Justice: Did you tender evidence in support of the allegation you made as to the wrongful importation of goods?

Witness: I had some ground for making the statement, but I had no means of producing it, so, acting on advice, I apologised. That was before the Court was held, and Major Scott shook hands with me on the withdrawal. The President of the Court of Inquiry (Captain Duff) said that charge was a civil offence, and not one for that Court.

Mr. Justice Buchanan: A Court of Inquiry is held to inquire into the truth of certain charges Was that inquiry made?

Mr. Searle: No, my lord.

Mr. Justice Buchanan: He pleaded guilty.

Witness continued that after the 13th December he saw from the papers that the Court of Inquiry was to meet again. He therefore on the 18th December wrote, saying that he was not prepared at that time with his witnesses on the matter of the capitation grant. Major Duff told him that he would have an ample opportunity if brought before a court to produce witnesses, but that that Court of Inquiry had no power to compel witnesses to attend. Lieutenant Brown on December 13 told witness verbally that he was suspended, but he attended the orderly-room daily until the 13th January, the date of his dismissal. On the 31st December he applied in writing for a few days' leave of absence; it was not granted. Mr. Brown came to him, and told him verbally that leave could not be granted. On the 4th January he received a letter from the Acting-Adjutant instructing him to be at the orderly-room in undress uniform that night. Witness attended accordingly. Sergeant-Major Mawse told him that day that he was to be degraded and reduced before the sergeants. He was that night reduced, and then told he was dismissed, and asked if he had anything to say. Witness said he would appeal. He continued to attend at the orderly-room. On the 15th January he received a letter to the effect that his appeal could not be entertained. Early in January he applied for his December salary. On the 17th he again applied. There was a small cross-account, and Major Scott said that as soon as it was settled he would get his salary. Witness accordingly tendered his account for sale of St. Andrew's banquet tickets., &c, showing a balance of £1 due to him, which he had never received. On the 17th January he left the orderly-room. He then tried to get other employment, but failed until the 27th February, when he obtained temporary employment. He was now working nominally in someone's employ. The Commanding Officer never made any inquiry into the case.

Mr. Searle said the importance of that was that the regulations laid down that he should have done so.

Witness said he wished to correct one statement. It was the day after the first day of the inquiry that he apologised to Major Scott about

the importation of goods allegation, and Major Scott shook hands with him. Regarding the capitation grant charge, it was first brought to his notice in January, 1893, when Major Scott made out a list, and on certain occasions instructed him to mark off drills, and told him not to allow any man to hang for want of drills. Ultimately, when Major Scott went away on leave, and while he was away, Captain Jardine and witness struck off about eighty men who were still on the strength as efficient.

Mr, Justice Upington: This is a most serious charge. Do you mean to say that Major Scott asked you to keep eighty or ninety non-efficient men on the capitation grant?

Witness: Major Scott would not allow me to strike any men off.

Mr. Justice Upington: You say that Major Scott would not allow you to strike any non-efficient men off the roll, and that Captain Jardine and Mr. Parker afterwards, in conjunction with yourself, struck off those men, so that the Government was defrauded.

Witness: The Government was defrauded.

Mr. Justice Upington: That is your charge.

Examination continued: The charge was that £850 in capitation grants had been received, and only £500 earned. When Major Scott came back in October, 1893, witness gave Major Scott a roll of men who were not effective. Regarding the charge about stores, it was found by the Court of Inquiry that witness had never made any such allegation. Regarding inciting the members of the corps to depose Major Scott, witness had never done so. Major Scott appointed witness in the first instance. He assisted Colonel Kelly in drafting regulations. After his suspension he continued to perform clerical duties, but not drill-instructing. He received £12 a month from the Cape Town Highlanders and some extras for the care of arms. Also £3 a month from Imperial sources. He was still in receipt of the latter.

Cross-examined by Mr. Graham: He joined the Cape Town Highlanders as a Volunteer on the 24th May, 1893. Some of his appointments in the Highlanders were held in his private capacity and some as a Volunteer. He could be an orderly-room clerk without being a Volunteer; he was not made orderly-room sergeant until afterwards. At the time of his dismissal he was staff-sergeant in the Cape Town Highlanders. When he first took over the storeroom he found that several things were not in store which ought to have been. He believed that the acting adjutant, Mr. Brown, was wearing a pair of the boots. He did not, however, wish to impute that the boots were stolen. Only that the accounts had not been properly kept. On the 13th December he received a civil summons from Major Scott for £20 for slander on the importation of goods charge. Witness, when he apologised, said that he had uttered the words over a bottle of beer, and that they had slipped out. He stated to four people that Major Scott had defrauded the revenue. An attempt had been made to pass a certain parcel (five sets of shoulder-knots) through without paying duty, but it did not succeed. Witness did not say that Major Scott was in the habit of doing this. When he was dismissed, however, he went to work to try and find out whether there had been any other instances of Major Scott attempting or succeeding in defrauding the revenue. He had before then heard there was another parcel of goods besides the shoulder-knots. He now said that Major Scott attempted to defraud the revenue in the case of the shoulder-knots. Duty was paid on that parcel, but an attempt was made to pass it through. He understood from his (Major Scott's) two sons, Bernard and John, that Major Scott had in other instances attempted or succeeded in defrauding the revenue.

By Mr. Justice Upington: I have obtained more evidence since my dismissal about the shoulder-knots.

Examination continued: The position he took up at the Court of Inquiry was that his allegation was true that Major Scott had told him to falsify the capitation grant by marking men up for drills who were not entitled to it. (Witness here described in detail the methods by which he alleged that Major Scott kept men on the effective strength.) He had instructions from Major Scott to mark men down for drill who had not attended the drill, and he did so. He had to do it because Major Scott was his superior officer, but nevertheless he called on Colonel Southey on the subject, and after the dismissal, and Colonel Southey said he could not hear anything about it. He intended to make his complaint at the half-yearly inspection, and if he had not been dismissed he would have done so. The trouble originated by witness refusing, on the Major's return from England in October, to go on with the frauds. He told Major Scott that during the previous half-year they had run the corps straight, and that they would have a good capitation grant, and an honest one. They were both in plain clothes, and he believed that Volunteers of all grades were equal when in plain clothes. In December he applied for leave of absence in the usual form, and handed his letter personally to Lieutenant Brown, who told him Major Scott would not allow it. Brown

and Parker, during Major Scott's absence, agreed with witness to strike the non-effective men off the roll, as they did not intend to have any more "verneukery." Major Scott said that they were not to allow men to hang for want of drills. That meant that witness was to mark men up for drills. He remonstrated with Major Scott. A good many others knew that the Government was being defrauded, Captain Jardine and Lieutenant Parker. Major Scott, before he left with the Bisley team in May, 1893, said in the presence of Jardine and Parker that they were not to allow men to hang for want of drills. He understood that Willoughby, the previous orderly-room clerk, also left the corps because he would not assist Scott in defrauding the Government. Did very few of his ordinary duties after his suspension. He appealed against the decision of the Court of Inquiry to the Colonial Military Secretary, so that the whole matter might be thoroughly investigated, and he at last had had to come to that (Supreme) Court to do it. Under the regulations a weekly return of drills had to be made. Of course this return repeated the falsification in the books. Therefore the weekly drill returns were false.

By Mr. Justice Upington: The fraud that was done was that the men who had not attended drills were marked so as to show that they had attended the necessary number of drills to earn the capitation grant.

Examination continued: Honestly speaking, he thought several of the officers knew of this. Major Scott, Captain Jardine, Captain Parker, Lieutenant Brown, and Captain Searle, he believed, knew it. Could not say about Captain Robertson or Major Duff. At the beginning of the Court of Inquiry Major Duff said that the charge about the importation of goods was a civil or personal matter, and did not affect the Court of Inquiry. That was why no evidence was led on that charge. Although he "pleaded guilty" it was a purely formal plea, and did not convey that he withdrew his allegation. Zimmer, McLelland, Thompson, Milne, and Robertson were some of the men whose drills were falsified.

Cross-examined: Willoughby was not in town. On December 1 he spoke to Major Duff about resigning. That was because he was dissatisfied with Major Scott's methods on the capitation business. Was born in the regular army; served seven years, and in 1889 was recommended for a commission. His father was a colonel and retired major-general. Witness went up for Sandhurst, but did not pass. He then entered the ranks for the purpose of getting a commission.

By the Chief Justice: Was prepared to prove that Major Scott was a smuggler.

The Chief Justice said that it appeared that Leonard was a civil servant as orderly-room clerk under Major Scott; was it likely that he would not be dismissed after making such an allegation? The main question would be whether Leonard performed duties after his suspension on the 13th December.

Mr. Searle submitted that it was not an ordinary case of master and servant. Leonard was under the Volunteer regulations, and the defendant in his plea relied on the fact that the plaintiff was a Volunteer.

James Andrew Searle, captain in the Cape Town Highlanders, deposed that he was one of the members of the Court of Inquiry. That Court was not called for the purpose of expressing an opinion. He remembered Leonard coming to him, before all the trouble arose, and asking him to find him employment. Witness advised Leonard to apologise for his allegation about smuggling. Leonard said he was in liquor, and could not substantiate what he said The books of the corps were impounded for the Court of Inquiry. The charge about the missing stores was not pressed by the Court of Inquiry.

Cross-examined by Mr. Graham: Knew nothing about the alleged capitation frauds.

William Jardine, captain in the Cape Town Highlanders, remembered Major Scott going Home in May, 1893, in charge of the Bisley team. Major Scott saw witness, Captain Parker, and Leonard together on many occasions. Remembered Scott telling him to see that the men got their drills in. After Scott left, witness struck off many men every month. Some of these were men who had resigned; his impression was that they had resigned during the previous half-year. Whether men had resigned or not, if they had before their resignation put in a sufficient number of drills they would be entitled to the capitation grant. Never had a conversation with Leonard about running the regiment straight, witness struck off the roll a certain percentage every month.

Mr. Searle said he wished to put to the witness a certain statement submitted to him, and thereafter agreed to by him as correct.

Mr. Graham: I object to that.

The Chief Justice: The witness may be hostile, but he has not shown it.

Mr. Graham: I am satisfied with his evidence.

Mr. Searle: You did not wish to be called?

Witness: No. Mr. Bisset called on him with a statement, and witness said it was pretty correct. I particularly wished not to appear.

Did not know to his own knowledge of any wrongful statement being made in order to get the capitation grant.

John Parker, late captain and adjutant in the Cape Town Highlanders, said that in the beginning of 1893 a number of men had resigned during the previous half-year. Witness told Major Scott that they should be struck off, but it was merely for the purpose of keeping up appearances. Unless drills were shown of the resigned men, it would not affect the capitation grant. Did not know any particular case, but believed that it sometimes happened that men were wrongfully given drills. His impression from a long experience of the corps was that it was done after Major Scott went away, about forty or sixty resigned men were struck off. He fancied that some men were filled in as attending drills who were not present. Never heard the Commanding Officer giving instructions that this should be done.

John Zimmer, formerly in the Cape Town Highlanders, said that on one occasion he wanted leave off a parade. He told Major Scott he wanted leave and Scott said he was to be marked up or off — he did not know which.

John Tudor Thompson said he was formerly a private in the Cape Town Highlanders. From January to June he put in only three drills, and from June to December, 1893, only four drills, and was never sued for capitation grant. Once he saw Major Scott and said he wished to resign. He pointed out that he had not put in sufficient drills, but Major Scott said that would be all right. He was never sued for capitation grant.

Thomas Alfred McLelland, now a member of the Cape Town Highlanders said: In March, 1893, he wanted to go up-country. The Major said if he simply reported himself to Leonard, it would be marked up as a drill. The Major said any time he was in town he need simply report himself and it would be put down as a drill. He accordingly reported himself, and he believed it was put down as a drill.

Examined by Mr. Graham: He believed he had already at that time put in more than the necessary number of drills.

John Scott, jun., son of Major Scott, said his brother Bernard, in witness's presence, spoke to Leonard on the subject of imported goods by Major Scott. He could not swear that Major Scott had imported goods duty free under a cloak. He and his brother spoke about some military trimmings imported by Major Scott duty free for uniforms of officers of the corps.

The Chief Justice: Were these things allowed duty free?

Witness: It had to be certified that they were to be used for Volunteer officers.

Cross-examined by Mr. Graham: Goods imported under a certificate could be imported duty free.

Mr. Searle: And you say the goods were used in the business?

Witness: The goods would have to be used for Volunteer or Imperial uniforms.

Hutton Watermeyer, lieutenant in the Cape Town Highlanders, stated that very little was said at the Court of Inquiry about the charge as to the importation of goods. Believed it was withdrawn by the Adjutant, who also did not press the charge about the boots missing from the stores.

Cross-examined by Mr. Graham: Leonard had every opportunity of producing evidence at the Court of Inquiry.

By the Court: Did not see Leonard perform any duties after his suspension.

William J. Bolton, staff-sergeant in the Cape Mounted Rifles, said he was acting as Colonel Southey's clerk. Leonard did not report himself to witness in January of this year. Leonard, as far as he knew, had done no work after December 13.

Leonard here produced a book, showing that Thompson drew the capitation grant for the first half of 1893.

This closed the case for the plaintiff.

Major John Scott said he was the first Commanding Officer of the Cape Town Highlanders since its formation. On December 13 he gave instructions that Leonard should be suspended, and he should not have worked afterwards.

Cross-examined by Mr. Searle: Saw Leonard at the orderly-room after December 13, but only once. Then told the Adjutant to tell him to clear out. Leonard might have been there every day. He was dismissed on 31st December, and on the 4th January Leonard was told of it. Leonard, on the day after the Court of Inquiry, apologised for having told such lies, and witness shook hands with him in his civil capacity. Witness was the senior officer of the corps in the absence of the Lieutenant-Colonel commanding.

Mr. Searle said he would show that the regulations compelled the Commanding Officer to institute the inquiry.

Examination continued: Captain Duff was delegated to preside at the Court of Inquiry.

The Chief Justice said that if Leonard had been dismissed in his military capacity such evidence might have been in point, but he was made orderly-clerk and was dismissed as such, and an orderly clerk was a civil position.

Mr. Searle said Leonard was a staff-sergeant and Volunteer as well. He was also a musketry

instructor, and Leonard had not received his salary in that capacity.

Examination continued: Witness had forbidden Leonard to attend at the Orderly-room on December 14 in his civil, but not in his military capacity. He denied all the evidence that had been given about the capitation grant. Had never given authority to Leonard to mark up any drills men were not entitled to. McLelland's evidence in that respect was incorrect. Regarding men being kept on the strength after resignation, they were struck off from time to time according to usage. Never kept them on in order to get capitation grant. Never heard a word about any suspicion in that particular on the regiment. The first time he ever heard of it was at the Court of Inquiry. It was quite the other way. He believed men sometimes earned capitation grant, and did not receive it. Never instructed Leonard to mark men down for drills not done. Colonel Sir James Sivewright was the Commanding Officer, and during his absence witness was the head of the regiment. Suspended Leonard for the military offence of attempting to depose him. The statement that he had evaded duty was a deliberate falsehood. (Witness here produced invoices and documents showing that the duty was paid on the shoulder-straps.) It was a wicked lie to say he had ever evaded duty.

James McLaren Brown, Acting Adjutant, Cape Town Highlanders, in December last, said that Major Scott told him to suspend Leonard. After the suspension Leonard did certain unimportant work at witness's request.

Cross-examined by Mr. Searle: Would not swear that Leonard did not make up records after the suspension, but thought he could not have done so while under suspension.

By the Court: When he suspended Leonard, it was understood that it was a suspension from the whole of his duties in connection with the regiment.

Mr. Graham said he had a number of witnesses showing that Leonard had every opportunity of bringing evidence at the Court of Inquiry.

The Chief Justice said that the record of the Court of Inquiry did not show that the charges had been withdrawn. At the present stage no more witnesses need be called, but if Mr. Searle succeeded in making out a *prima-facie* case for the plaintiff, more witnesses might be called.

Mr. Searle having addressed the Court,

Mr. Graham was heard on the question of the date of the suspension and dismissal.

Judgment was given for plaintiff for £12, each party to pay his own costs.

The Chief Justice said: This is an action in which the plaintiff claims damages for his alleged wrongful dismissal from employment as orderly-room clerk, musketry instructor and store-keeper of the Cape Town Highlander Volunteers. The action is not for damages for improper dismissal from the regiment, nor is it for an interdict to restrain the defendant from preventing him to serve in the regiment, and it is therefore unnecessary to enter into a discussion as to whether the proceedings of the Court of Inquiry were regular or not. The defendant is the Lieut.-Colonel in command of the regiment, and at the time when the dismissal took place he was the major in practical command. It was he who, acting for the Lieut.-Colonel, engaged the services of the plaintiff and afterwards dismissed him. The simple question is whether the plaintiff was guilty of such misconduct as would justify his dismissal without notice. The degree of misconduct which would justify the summary dismissal of a servant must depend upon various circumstances, but I take it that where a servant has falsely spoken or wrongfully acted in such a manner as seriously to injure the master's reputation and make it impossible for the two to act in harmony thereafter, the master would not be bound to retain the servant in his service. The plaintiff admits that in the presence of others, fellow Volunteers as well as strangers, he made the deliberate statement that the defendant had in effect abused his position as major in the regiment by importing dutiable goods without payment of duty under the cloak of their being required for Volunteering purposes. Such conduct would certainly unfit the defendant for command and expose him to heavy penalties. If the plaintiff could have proved his assertion he would have been justified in making it, at all events, to the proper authority, but before the Court of Inquiry he admitted having made the assertion and he produced no proof in support of it. He might in the present case, in reply to the plea that he was dismissed for good and sufficient cause, have pleaded the truth of the statement, but he neither pleaded the truth nor did he adduce evidence to prove it. Considering how essential proper discipline is to the welfare of a regiment, it would be difficult to hold that a salaried official of the regiment is entitled as of right to retain his post after having been found guilty of making a false accusation of this kind in the presence of members of the regiment. On the 13th December he might have been lawfully dismissed, but the final dismissal did not take place till the end of the year. He is entitled therefore to his full salary till then, viz., £12,

The defendant has tendered only £6, and the question is whether the plaintiff should have his costs. The real question to be determined was whether he could be properly dismissed, and as it is obvious that a tender of £12 would not have been accepted, the judgment will be for £12, each party paying his own costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Tredgold & Co.,; Defendant's Attorney, D. Tennant, jun.]

REGINA V. JIZWA. { 1894. Nov. 19th. Nov. 26th.

Native Territories Penal Code—Act 4 of 1861—Evidence without oath—Promulgation of law—Cession of territory—Allegiance—British subjects—Imperial Act, 26 and 27 Vic., cap. 35—Culpable homicide—Murder—Special Court of Pondoland West—Appeal.

On the record of a trial for murder, in contravention of the 142nd section of the Native Territories Penal Code, before the Special Court for Pondoland West, it appeared that the witnesses for the prosecution gave their evidence without being sworn but after being duly cautioned.

Held, *that the 12th section of Act 4 of 1861 was applicable to that Court, and that it must be presumed that the witnesses were found not to understand the nature of an oath, and that the admonition required by the section was duly given to them.*

In a ceded territory the laws thereof remain in force until altered by the new sovereign power and those subjects who elect to remain in the territory become subjects of the new sovereign.

On the 20th of March, Western Pondoland was proclaimed to have been duly ceded to Her Britannic Majesty, and on the 3rd of April, 1894, the Governor of the Cape Colony was duly empowered to make by proclamation such laws as might to him appear necessary for the peace, order, and good government of the territory, but no such laws were made until the 22nd of May, 1894, on which day the Native Territories Penal Code was by proclamation in the Cape Government Gazette extended to such territory.

Held, *that the appellant, a Pondo who had elected to remain in the territory after the cession, did not, under the 1st section of the Imperial Act 26, and 27 Vic., cap. 35, become amenable to punishment according to the Colonial Criminal Law for an offence alleged to have been committed by him after such cession and before the promulgation of the Penal Code.*

The indictment charged the appellant with having on the 22nd of May, 1894, committed murder in contravention of the Penal Code, but there was no proof that the publication of the Gazette on that day preceded the alleged commission of the offence.

Held, *that the proclamation of the 22nd of May in the Government Gazette was tantamount to a promulgation by virtue of the commission granted to the Governor on the 3rd of April, but that, in the absence of proof that such promulgation took place before the alleged offence was committed, or that by the law of Pondoland murder was punishable with death, the appellant could not be tried for a contravention of the Code.*

The evidence being barely sufficient to establish culpable homicide and quite insufficient to establish murder,

Held, *that a conviction and sentence for murder must be set aside by the Supreme Court as Court of Appeal.*

This was an appeal from the conviction of the accused before the Special Court for the territory of Pondoland West, on a charge of contravening the provisions of the Penal Code, on the ground that the said Code was not in force at the time the alleged offence was committed, and that the proceedings were otherwise irregular and illegal.

The accused was charged with the crime of murder in contravention of section 142 of Act 24 of 1886, in that upon or about the 22nd May, 1894, and at or near Mgezwa, in the district of Nggeleni, the said Jizwa did wrongfully, unlawfully, and maliciously kill and murder one Tokwe, in his lifetime a peasant, and then residing at Matshoba, in the district of Nggeleni.

The accused was found guilty and sentenced to death.

The appeal was based on the following grounds:

1. That Act 24 of 1886, which appellant is charged with having contravened within the territories of Eastern and Western Pondoland on the 22nd May, 1894, was only purported to be promulgated as in force in the said territories in the "Government Gazette" of this colony published at Cape Town on the 22nd May, 1894.

That the said territories formed no portion of this colony at that date, and the said proclamation did not have the effect of making the said Act law within the said territories.

2. That the said proclamation was not published in the said territories on or before the 22nd May, 1894, or at all, and that the said Act had not otherwise acquired the force of law in the said territories at the date when the said crime is alleged to have been committed, or at the date when the appellant was tried.

3. That if the appellant committed the act with which he is charged, there is no proof that it was committed after the said Act had been made applicable to the said territories.

4. That the witnesses for the prosecution were not duly sworn; that no reason in fact is alleged for dispensing with the oath of the said witnesses, and that in law it was not legal or competent to dispense with the oath.

5. That the evidence given for the prosecution was insufficient to justify a conviction.

6. That the appellant, if guilty, is only liable for such punishment as was prescribed by the law in force in the said territories at the date the crime was committed and before the said Act obtained the force of law therein, and there is no proof of the punishment prescribed as aforesaid; that the Court that tried the appellant was not qualified to state or lay down the said law in respect thereof.

7. That the punishment in force as aforesaid was a fine, as will be ascertained on reference to authority competent to decide the point.

8. That the judgment and sentence of the said Court were otherwise bad in fact and in law.

The facts are fully stated in the judgment of his lordship the Chief Justice.

Mr. Searle, Q.C., in support of the appeal: Act 24 of 1886 was only purported to be proclaimed as being in force in Pondoland by publication in the "Gazette" at Cape Town on 22nd May, 1894, the very day on which the alleged murder was committed.

The Proclamation was not published in Pondoland on or before the 22nd May. There is no proof that the act was committed by the accused after the Native Territories Penal Code had been made applicable to Pondoland.

The evidence upon which the accused was convicted was most unsatisfactory, and as it was not on oath it should not have been received. Act 4 of 1861 could not apply, because under the Proclamation of 25th September, 1894, statute law is expressly excluded except certain specified Statutes, and Act 4 of 1861 is not one of them. At the time of the alleged murder Pondo law was in force and under that law the punishment for murder is a fine and not death

Mr. Schreiner, Q.C., Attorney-General, for the Crown: As to the witnesses not having been sworn the Court must presume that they were unable to understand the nature of an oath and that they were duly admonished as required by Act 4 of 1861, section 12. As to the promulgation of the Penal Code, the publication of the Proclamation in the "Gazette" was sufficient. In any event it makes no difference whether the crime was committed before or after the proclamation, as the Act 26 & 27 Vic., cap. 35, section 1 applies. A reversal of the judgment will probably have the effect of weakening the influence of the magistrates in Pondoland.

Mr. Searle, Q.C., in reply.

Cur ad vult.

Postea (26th November.)

The Court delivered judgment.

The Chief Justice said: The appellant was tried in the Special Court for Pondoland West for the murder of one Tokwe, in contravention of section 142 of Act 24 of 1886, known as the Penal Code. The murder was alleged to have been committed on the 22nd of May, 1894, and the trial took place on the 11th October. At the trial prisoner's counsel raised the objection that the Proclamation extending the Penal Code was only published in Cape Town on the very day on which the offence was said to have been committed, but the objection was not sustained, and the prisoner was convicted and sentenced to death. Against that conviction and sentence he now appeals to this Court. The main grounds of appeal are that the witnesses were not sworn before giving their evidence; that there is no proof that the alleged offence was committed after the promulgation of the Penal Code in Pondoland, and that the evidence for the prosecution was insufficient to justify a conviction. The witnesses examined were all natives, and although they were not sworn they appear from the record to have been duly cautioned. Not one of them could state the exact date of the events to which they deposed, but some of them say that it was "about four months ago." On that indefinite day there was a hunting party of about ten men in a forest, at the edge of which the prisoner lived. He met the hunting party, and asked

three of them to come to his place, and witness a purchase by him of a horse from one Welani. They went, and had some beer to drink at the prisoner's kraal. When the sale had been concluded the three men went back to the hunt, and prisoner fetched his gun and joined in the hunt. A remark was then made by one Goniwe that the beer was bad, and he says in his evidence that he soon afterwards heard Tokwe—the man who is said to have been killed—say that he could not come on, as accused would not let him on account of having heard his beer called bad. Goniwe adds that he soon after heard the report of a gun in the direction where the prisoner and the deceased had been talking. He admits that he did not see the prisoner, but says he recognised him by his voice. Goniwe hearing from someone that Tokwe, who was his brother, had been killed, went after the prisoner, but not finding him Goniwe went to the prisoner's kraal and took away his cattle, as a punishment, it would appear, for the offence. Another witness says that there was no altercation whatever in the forest, but that after the shot was fired he saw prisoner running away, and that on being asked why he was running away he said, apparently without stopping, "Do not ask me; it is guilt." The witness adds: "I then traced his footsteps and came upon deceased's body. He was dead, and was lying on his stomach. I did not touch the body. I saw blood. I did not see the wound." Another witness says: "There was no quarrel between deceased and prisoner." That was the sole evidence against the prisoner. In his statement the prisoner says that four shots were fired in the forest, that the killing must have been accidentally caused, and that the witnesses took the opportunity of throwing the guilt on him for the purpose of possessing themselves of his cattle. The first objection to the sentence on the ground that the witnesses had not been sworn cannot in my opinion be sustained. The Special Court had the same power as Courts in the Colony proper have, under Act 4 of 1861, of taking evidence, without the sanction of an oath, of persons who from ignorance do not understand the nature of an oath. We are bound to assume that the Special Court was satisfied as to the ignorance of the witnesses, and that the admonition which the Act requires was duly given to the witnesses. The fact, therefore, that none of the witnesses were sworn does not constitute a ground for setting aside the verdict, but it certainly affords a strong reason for regarding their evidence as that of very ignorant men. The witnesses were wholly unable to state the date when the offence was committed, and yet this is a case in which the exact date is of essential importance. If the offence was committed before the 22nd May, there is nothing to show that by the laws and customs of Pondoland it was a crime punishable by death, and therefore the remarks made by the Court of Appeal in *Queen* v. *Umditchwa* (1 Buch. Ap. Ca., 77) do not apply. The relatives of the deceased man appear to have considered themselves justified by the laws and customs of their country to inflict summary punishment upon the accused by promptly taking all his cattle. Until the 22nd May the laws and customs of the tribe had not been interfered with. It is true that the cession of the territory had taken place previously, and that on the 20th of March, 1894, a proclamation had been issued by the Governor of this colony, accepting the cession on behalf of Her Majesty. It is true also that on the 3rd of April, 1894, a commission from Her Majesty was published, empowering the Governor to make by proclamation such laws as may to him appear necessary for the peace, order, and good government of the territory, but no laws were made until the 22nd of May, and in the meantime the laws and customs of the territory remained in force. I am inclined to agree with the Attorney-General that the publication of the proclamation in the "Government Gazette" of this colony on the 22nd May was tantamount to a promulgation of the Penal Code throughout the ceded territory. The constitution of every country must determine the mode in which new laws shall be promulgated, and inasmuch as the paramount Legislature of the ceded territory authorised the Governor of this colony to make laws for the territory by proclamation, it may fairly be assumed that such proclamation, published in the only available vehicle for conveying official information, was intended as the mode of promulgation. That there must be a promulgation of a law before it can have any legal force in any country is a principle which has been accepted in every civilised country. It was acted upon in the Roman law, and it was enforced with the greatest strictness in the Dutch law. A striking instance is afforded by a case decided in the Supreme Court of Holland and reported in the first of Coven's *Observationes*. It was there held that although the political ordinance was a general enactment for the whole province it was not binding in the town of Briel because it had not been duly proclaimed within the precincts of the town. The consequence was that the estate of a person who died intestate in the town was ordered to be distributed according to the common law relating to intestacy, and not under the 28th article of the Ordinance. The case is cited with approval by *Groenewegen*

(Leg. abr. Dig. 50, 9; Voet 1, 3, 10), and other commentators of repute. It is a fair contention, as I have already observed, that if the Governor's commission authorised him to promulgate laws for Pondoland by publishing them in the "Cape Gazette," even before that territory was annexed to the Cape Colony, the Court ought not to require proof of publication within the territory itself. But there exists every ground for not extending this departure from legal principle beyond the absolute necessities of the case. If publication of a new law, in a paper issued hundreds of miles distant from the territory in which the prisoner is alleged to have committed the offence, is to be regarded as a promulgation of the law in such territory, there ought, at all events, to have been clear and conclusive proof that the offence was committed after, and not before such publication. The evidence upon this point is most obscure and inconclusive. The Attorney-General candidly admitted that it is quite possible the offence may have been committed before the date laid in the indictment. But even assuming it to have been committed on that day, we have no evidence as to the time of day when it was committed or when the "Gazette" was published. It is probable that the promulgation of the new law preceded the alleged commission of the offence, but it is quite possible also that the offence preceded the promulgation. In view of the strong presumption which exists against anything like *ex post facto* legislation, the question as to which event first took place must depend upon a certainty and not upon mere probabilities. In the absence, therefore, of satisfactory proof that the Penal Code was in force in Pondoland before the deceased was killed, I am of opinion that the appellant could not be tried for a contravention of the Code. But, says the Attorney-General, even if the Penal Code was not in force, the appellant, by virtue of the cession of Pondoland to Great Britain, became *ipso facto* and *ipso jure* a British subject, and as such became amenable, under the Imperial Act 26 and 27 Vict., c. 35, to the laws in force in the Cape of Good Hope for the punishment of crimes therein committed. These laws are extended by the first section of the Imperial Act to all Her Majesty's subjects within any territory in Africa being to the southward of the 25th degree of latitude, and not being within the jurisdiction of any civilised government. This last qualification is important. By the very act of cession the territory came within the jurisdiction of a civilised Government. That Government could immediately have promulgated a law extending the Colonial Criminal Law to Pondoland, but as such a promulgation was delayed until the 22nd of May, British subjects committing crimes in Pondoland during the interval could not be punished under Colonial law. Moreover, is it quite clear that the appellant became a British subject immediately after the cession of the territory? The question is a very interesting one, and if it had been material to the decision of the present case it would have deserved more serious discussion than it received at the bar. There was a time, no doubt, when the question would probably have received an affirmative answer, but the current of modern legal opinion is in the opposite direction. By the Treaty of Breda in 1667, England ceded Surinam in full sovereignty to Holland, while Holland, in the same manner, ceded New York, then known as Manhattan, to England. Disputes afterwards arose out of the treaty, and were settled by John de Witt and Sir William Temple. The conclusion arrived at by the former, and acquiesced in by Temple, was that the English who remained at Surinam became Dutch subjects so completely that they could not apply to their native country for aid consistent with the law of nations. In the same manner the Dutch people at Manhattan became English subjects, and aliens to their native land. Many modern jurists, however, maintain that the mere fact of annexation does not create the relation of sovereign and subject but that there must be either an express or a tacit submission for the purpose, and that remaining within the sphere of the new dominion, and fulfilling the duties of subjects, would amount to tacit submission. As the appellant remained for two months after the session within the ceded territory, we may assume that he elected to become a British subject, but even so, he did not fall within the operation of the Imperial Act, which only applies to territories outside the jurisdiction of any civilised government. The objection, therefore, of want of proof that the alleged offence was committed after the promulgation of the Penal Code ought to have been sustained in the Court below. Even, however, if the second objection had failed, I should have found great difficulty in sustaining the verdict upon the meagre and unsatisfactory evidence given in this case. It is extremely probable that Tokwe was shot in the forest and that he died from the effects, but the proof is not by any means conclusive. There is no evidence whatever as to the nature of his wound, or as to what became of his body after he was said to have been killed. But assuming that he was shot, it is by no means impossible that one of the many other huntsmen may have fired the shot. Assuming, further, that the

shot was fired by the appellant, there is really nothing to show that it was wilfully done. The native mind may be inscrutable to a European, but I am quite unwilling to believe that Goniwe's passing remark that the prisoner's beer was not good would supply a sufficient motive for deliberately killing Tokwe, who had said nothing about the beer. No other possible motive could be suggested. The prisoner had asked Tokwe and his friends to witness the purchase of a horse, the purchase was effected without a hitch, the parties all joined in the hunt on the best of terms, and if the prisoner did shoot Tokwe it must either have been an accident or, at the utmost, carelessness in the handling of his gun while detaining Tokwe in the forest. I do not lose sight of the somewhat doubtful evidence that the prisoner, when asked why he was running, said it was guilt, but even if the words were used they are not inconsistent with the prisoner's having had no intention to kill Tokwe. Under the 140th section of the Penal Code, culpable homicide becomes murder if the offender means to cause the death of the person killed, or if for any unlawful object he does an act which he knows or ought to have known to be likely to cause death. The evidence wholly fails to convince me that the prisoner either meant to kill any one or for any unlawful object did an act which was likely to cause death. Taking the evidence most strongly against the prisoner, the utmost it comes to is that by recklessness in the handling of his gun he occasioned the death of Tokwe, and that, on the impulse of the moment, he fled instead of surrendering himself, as he afterwards did, to justice. He may have been guilty of culpable homicide, but he ought not, upon the evidence, to have been convicted of murder. That evidence is so meagre, so obscure, so tainted, and so unsatisfactory upon most material points, that this Court cannot, as a Court of Appeal, support the verdict. The Attorney-General was justified in pointing out to this Court that a reversal of the judgment of the Special Court, consisting as it does of the Chief Magistrate and two Resident Magistrates, might have the effect of weakening the influence of those functionaries among the natives. We are quite alive to the danger; but it would be a still greater danger if the natives lost confidence in the sense of justice of their rulers. The appeal must be allowed, and the conviction and sentence of death quashed.

Mr. Justice Buchanan: I agre that this appeal must be allowed on the legal grounds raised. Had the case rested solely on the question of evidence, I should have had very great difficulty, considering the known ability and care of the Magistrates who tried the case, in interfering with their verdict, solely on the question of fact. At the same time, on carefully reading over the evidence, I think that had I been the presiding judge, I should have considered under all the circumstances of the case that at most the evidence could only support a charge of culpable homicide. However, on the question of law, so eloquently stated by the Chief Justice, the appeal must be dismissed.

Mr. Justice Upington: I agree fully with the judgment that has been delivered. The Chief Magistrate and the other two Magistrates who assisted him were men perfectly capable of deciding these points, and their judgment should receive the greatest weight at the hands of this Court, and I should, like my brother Buchanan, have had great hesitation in interfering with their judgment if I had not a doubt as to whether the Penal Code was in force at the time of the alleged offence.

[Appellant's Attorneys, Messrs. Fairbridge & Arderne.]

MICHAU V. MICHAU'S EXECUTOR. { 1894. Nov. 19th.

Will—Children and grandchildren—Representation.

Husband and wife by their mutual will appointed "the survivor of them together with the children begotten or to be begotten by their marriage (in case of predecease of any of the children then the lawful descendants of the deceased by representation), *as his or her heirs."*

One of the children had died before the execution of the will leaving the plaintiff, an only child.

Held that, *after the death of the first dying testator, the plaintiff was entitled to an equal share with the testators' surviving children of the estate of the first dying testator.*

This was a special case stated for the determination of the Court in the following terms:

1. The plaintiff, who is a minor, is the granddaughter of the testators hereinafter referred to, and she brings this action assisted by her *curator ad litem*, Johannes Hendrik van Heerden. The defendant is the executor testamentary of the late Willem Jacobus Michau, sen., in his lifetime resident at Groenfontein, in the district of Cradock.

2. On the 8th July, 1887, the said Willem Jacobus Michau, sen., and his wife, Hester

Johanna Michau, who were married in community of property, executed a mutual will, a translation of which is hereunto annexed, and the parties pray that it may be considered as forming part of this case.

3. Certain legacies are specially bequeathed by the said will, and a usufruct in the joint estate under certain conditions is reserved to the survivor, and then the will proceeds: "And now proceeding to dispose the first dying declares to nominate and appoint the survivor of them, together with the children begotten or to be begotten by their marriage (in case of predecease of any of the children then the lawful descendants of the deceased by representation), as his or her sole and universal heirs, and such of all the goods which the first dying may be possessed of at the time of his or her death."

4. The testatrix died on the 21st day of November, 1888, and the testator died on the 21st of March, 1892, without having revoked or altered the said will, or made any other testamentary disposition.

5. Ten children were born as the issue of the said marriage, of whom nine were alive both at the death of their mother and of their father, seven of these children are majors and two are minors. The defendant is the guardian of the minors. One of the children, Willem Jacobus Michau, died on the 16th of January, 1886, leaving him surviving one child, the plaintiff. The testators at the date of the execution of the will were aware of the death of the said Willem Jacobus Michau.

6. The defendant in his capacity as executor, has filed a liquidation and distribution account in the estate of the late Willem Jacobus Michau, sen., and his predeceased spouse, from which it appears that the sum of £3,538 3s. 5d. remains as the proceeds of the joint estate for distribution.

7. The defendant does not propose to award any portion of this said residue to the plaintiff.

The plaintiff contends:

(*a*) That she, as the sole descendant of her father who predeceased his parents, is entitled under the said will to share equally with the nine children aforesaid in the net residue of the said joint estate.

(*b*) Or alternatively that she as aforesaid is entitled to an equal share with the said children of the estate of the late Mrs. Michau as it existed at her death.

The defendant contends: That the plaintiff is not entitled to any share of the estate of the late Mrs. Michau as it existed at her death, and that she is not entitled to any portion of the said sum of £3,538 3s. 5d.

Wherefore the parties pray for the judgment of the Court in favour of their respective contentions.

Mr. Rose-Innes, Q.C., for the plaintiff: The word predecease is wide enough to cover the case of a child dying before the will was executed as well as after its execution. As to the English law, see *Jarvis* v. *Pond* (9 Simon's Reports, 549); *Bebb* v. *Beckwith* (2 Beav., 208.); *Jarmin on Wills* (Vol., II. p. 1590.)

Mr. Juta, Q.C., for the defendant: The words *bij overleden* must refer to a future event, not to a past event. The will only contemplated the death of children after its execution. He cited *Voet* (30, 31, 32). It is clear that the plaintiff's first contention must fail.

Mr. Rose-Innes, Q.C., replied.

Judgment was given in favour of the plaintiff's second contention.

The Chief Justice said: It is quite clear that the plaintiff's first contention must fail because the provision of the will in question relates only to the estate of the first dying testator. The plaintiff's right if any under that will is to share with the testators' children and the survivor in the half-share of the first dying and not in the net residue of the joint estate. The second contention is that the plaintiff is entitled to share with the testators' children in Mrs. Michau's half-share of the joint estate. The plaintiff is a granddaughter of the testators, but her father, who was a son of the testators, died during the lifetime of the testators and before the date of the will. The defendant contends that the testators did not intend to appoint the plaintiff as one of the heirs of the first dying. Now let me first read the provision of the will without the words in brackets: "The first dying declares to appoint the survivor together with the children begotten or to be begotten by their marriage as his or her sole and universal heirs." This provision would not necessarily include grandchildren in the case of any of the children predeceasing the testators. As was remarked in *Pretorius* v. *Executors of Pretorius* (2 Juta. 293), the question whether grandchildren are included in the term "children" is one of intention to be gathered from the whole context of the will. There it was clear that the children of a child who predeceased the testators were intended to take his place as heirs, and it was held that a prelegacy for the benefit of the testators' children was intended to stand on the same footing as the institution of heirs. Let me next consider the effect of the words within brackets in the will now in question. "In case of predecease of any of the children the lawful descendants of

the deceased by representation" are to be heirs. It is urged that these words relate only to children who should die after the execution of the will, but I do not so construe them. The death of the first dying is the time which the testators must be held to have contemplated in appointing the heirs of the first dying. The descendants, therefore, of such children as died before that date were intended to take the place of such deceased children. The presumption is certainly against an intention to disinherit grandchildren, and if the words within brackets were doubtful the tendency of the decisions would be to let in the children of the deceased children at whatever time the latter may have died. The words within brackets, so far from rebutting the presumption, appear to me to support it. The plaintiff is entitled to take her father's place as heir notwithstanding his death before the execution of the will, and judgment must be given in terms of the plaintiff's second contention; costs to come out of the estate.

Mr. Justice Buchanan: I agree, but only wish to make it clear that this judgment does not affect the distribution of the survivor's estate.

Mr. Justice Upington: I am of the same opinion. I am satisfied that the intention of the will was to provide for the grandchildren and the child of the predeceased son.

[Plaintiff's Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

Re ROBB'S INSOLVENT ESTATE. { 1894. Nov. 20th.

Mr. Sheil, on behalf of Blaine & Co. and Rolfes, Nebel & Co., creditors in Robb's estate for over £1,600, moved for the appointment of Mr. W. A. Nash, of Philip's Town, as provisional trustee with power to sell perishables and collect outstanding debts.

The Court appointed Mr. Robb provisional trustee with the powers asked for.

CORDES V. MOORREES. { 1894. Nov. 20th.

Work and labour—Absence of argument as to price—Fair and reasonable charges.

Where no agreement had been entered into as to the cost of certain carpentry work, the Court refused to reduce the prices charged, being satisfied that they were fair and reasonable.

This was an action for £59 10s. 9d., instituted by Mr. Carl Cordes, a contractor, builder, and carpenter, carrying on business at Malmesbury, against Mr. Attorney Moorrees, also of Malmesbury.

The declaration alleged that the defendant in April last requested the plaintiff to prepare certain plans and specifications for the carrying out of certain carpentry and other work in connection with the defendant's house and grounds.

That the plaintiff duly prepared the plans and specifications, and that they were accepted and approved of by the defendant.

That thereafter the plaintiff, at the special instance and request of the defendant, carried out the work in accordance with the plans and specifications, and made certain articles and supplied certain materials for the same.

That for preparing the said plans and specifications, executing the said work, making the said articles, and supplying the said material there was due to the plaintiff the sum of £60 13s. 9d., less £1 3s., being the value of certain wood supplied by the defendant.

The plaintiff claimed judgment for £59 10s. 9d., with interest *a tempore morae*, and costs.

The defendant, in his plea, denied that he ordered the plans and specifications, or that he accepted or approved of them.

He admitted that the plaintiff did certain work and supplied certain materials, but he denied that the work was done according to plans and specifications supplied by the plaintiff, and he said that the work done was not done in a workmanlike and efficient manner, and that the value of it did not amount to £60 13s. 9d.

He pleaded a tender of £48 with costs to date of tender, and subject to his tender, he prayed that the plaintiff's claim might be dismissed with costs. Issue was joined on the pleadings.

Mr. Sheil appeared for the plaintiff, and Mr. Tredgold for the defendant.

Mr. Carl Cordes (examined by Mr. Sheil) deposed that he was a contractor living at Malmesbury. He did the carpentering work for the defendant's new house. Had also done other work for the defendant, who in April last requested witness to make a large wooden fence. Measurements were taken and the fence supplied, but subsequently defendant said he

wished the fence moved 2 feet nearer the house. This involved a large amount of work, as the fence had also to be structurally altered under defendant's instructions. He charged £10 15s., which included £3 5s. for the alterations. This was a very reasonable charge. Defendant then said he was quite satisfied with the fence, and instructed him to work up some old flooring boards for a stoep. While this was going on defendant instructed him also to make some trelliswork. He (witness) made out a plan for the latter, and defendant approved of the drawing. His charge for the trelliswork (£15 10s.) was very reasonable. Witness also made a partition for £8, two benches for £7, railings for £7 10s. He had worked on and off from April to July, when the work was finished. The defendant said he was satisfied, and never complained. When, however, witness presented his account for £59 10s. 9d. defendant said it was far too high, and that he would not pay it; he did not complain about the quality of the work. Defendant wrote him subsequently, stating that he had had the work valued, and that the appraisers had put the value at £24 odd.

In reply to the Court, Mr. Tredgold said these appraisers were two carpenters named Charley and Bill, who had since left for Australia.

Witness (continuing) said that subsequently the defendant increased his tender to £30, which he (witness) refused. Afterwards his attorney sent a letter of demand for £59 10s. 9d., to which the defendant replied that he would not pay a penny more than £30. Afterwards, the defendant wrote to say that he would have the work revalued by a Cape Town builder, the expense of which would fall on witness. Witness had taken the trouble to take qualified men from Cape Town to view the work, and he proposed to call them as witnesses.

Cross-examined by Mr. Tredgold: Materials were dearer at Malmesbury than at Cape Town, but the cost of labour was the same. The mistake in the fence was caused through defendant refusing to have drawings. When there were no drawings mistakes always arose in the work. The paint on the seats had disappeared, but it was the sort of paint intended to be absorbed by the wood, and a second coat was required. If men like Mr. Bartels or Mr. Cherry said he had grossly overcharged, he would say that his charge was reasonable. The defendant never asked him what the work would cost, and he did not submit any invoice until the whole of the work was finished. For the purpose of testing his charges, he asked Mr. Bartels to tender for similar work, and he tendered at £55. He was not calling Bartels as a witness. Bartels saw the work, and then defendant offered £40, and afterwards £48. Had defendant been gentlemanly in the matter he would have been prepared to come to a settlement. The seats for which he charged £7 might have perhaps been more expensive than imported seats.

Re-examined by Mr. Sheil: If the flooring of the stoep was warped it would not be his fault, as defendant supplied the wood. Would have gone over the work with Mr. Cherry with a view to settlement had the plans and specifications been available. The tender of £48 by the defendant was made after issue of summons. This was too low a tender.

By the Court: He had done a lot of work for defendant under contract previously, and had always been paid without demur. In the present case, however, there was no time to make a contract. Had he known beforehand all the work he had to do he believed he would have tendered higher than £59. He had four apprentices. He considered he had made nothing out of the job beyond wages for labour reckoned at £3 per week.

P. D. J. du Toit, one of plaintiff's apprentices, said he heard defendant tell plaintiff to work by the plans.

Examined by Mr. Tredgold: Witness earned 15s. per week. Mr. Cordes did most of the work.

H. J. Rust, another apprentice of Mr. Cordes, gave similar evidence.

Alfred King Hiller, a draughtsman and carpenter in the service of W. & G. Scott, of Cape Town, said that he tendered on plans and specifications supplied by the plaintiff at £61 15s. 6d. This was at Cape Town prices. He made no allowance for the cost of the plans. Subsequently he saw the work done by the plaintiff. It was equal in every way to Cape Town work. Considered the plaintiff's price reasonable. He would not have accepted £48 for the work. Had no interest in the matter. Knew nothing at the time he saw the work that it had been done piecemeal, or that any alterations had been made. He was asked to send in an estimate as though the work had not been done.

Examined by Mr. Tredgold: The stoep was well laid.

By the Court: He never saw Cordes before he came to him and asked for his tender.

Charles During, carpenter and builder in Cape Town, said that he gave an estimate of £75 for the work. He went to Malmesbury and inspected the work, which he thought was good. It was as good as he would have supplied on his tender of £75.

The correspondence having been put in, the plaintiff closed his case.

Mr. J. W. Moorrees, the defendant, said that Cordes had done good work under contract for him before the work now under dispute. When he presented his account, witness said that if his work had been done as well as the former he would not object to the charges. He did so because the work was bad and had evidently been done by raw apprentices. Plaintiff neglected witness's work for other that he was engaged in. He subsequently got Mr. Cherry and Mr. Bartels to visit Malmesbury and give their estimate of the work done by the plaintiff. Witness, when Mr. Cherry went to Malmesbury, wished the whole thing to be settled, but the plaintiff would not confer with them.

Cross-examined by Mr. Sheil: Witness was an attorney. He considered the plaintiff's charges excessive. Could get a good carpenter at Malmesbury at 6s. per day. He ordered no plans.

Mr. Frederick Cherry, architect, residing in Cape Town, said that at defendant's request he went to Malmesbury to inspect the work done by Cordes. Witness saw it, and made out a valuation. Cordes' work was not first class; on the contrary, it was very inferior.

Cross-examined by Mr. Sheil: Made his valuation on data given him by Mr. Moorrees. Made no allowance for extra work that might have been required in alterations to the work. The reductions in his valuation on the plaintiff's invoice were based on the price of material in Cape Town.

Mr. William Bartels said that the plaintiff in August produced some plans and specifications and asked for an estimate. Witness tendered at £55. He subsequently saw the work done at Malmesbury by the plaintiff. It was not well done. He had valued the work at £48.

Cross-examined by Mr. Sheil: He thought when plaintiff asked for his estimate there was work to do, and when he found there was no work to be done he wrote to the plaintiff on the subject. In neither of his estimates had he allowed for plans. He considered the work badly done, and yet he valued it at only £7 less than he himself had intended to charge. His valuation of £48 was based on what Mr. Moorrees had told him. All the work done by plaintiff was by hand.

Mr. Henry Vercueil deposed that he lived next door to Mr. Moorrees at Malmesbury. Skilled labour there was much cheaper than at Cape Town, while wood there was not dearer than at Cape Town. The trellis at his house cost, with wood, about £3 10s. The greater part of the work claimed for by the plaintiff was done by apprentices.

Cross-examined by Mr. Sheil: Witness was a law agent, but seldom went to his office in the afternoon. He and Mr. Moorrees were friends.

Counsel having addressed the Court,

Judgment was given for the plaintiff with costs.

The Chief Justice said: When the defendant engaged the plaintiff to do the work for him there were three courses open to him. He might either have entered into a contract stipulating the sum to be paid for the work; or he might have arranged that the price to be paid should be at the discretion of a third party as arbitrator; or the defendant might have left it to the plaintiff to make up his account at a reasonable rate afterwards. If he had made the contract, it would have been very much better for him; no mistake would have arisen, and he would only have had to pay the sum agreed upon by the contract. If a third person had been appointed to value the work he would have been bound only to pay the valuation; but the defendant chose the third course; he left it to the plaintiff to do the work, and to make a reasonable charge afterwards. Well, under such circumstances the Court can never scrutinise to a nicety the value of the work which a man has done. If he charges a reasonable price, even although a high price, I do not think the Court can interfere, or do other than direct that the party so engaged should be paid such reasonable price. Now a reasonable test to my mind in these circumstances would be this: Had the plaintiff known what he had to do what would he have tendered for? Now I am satisfied he would not have tendered for one penny less than he eventually charged. The defendant knew the work the plaintiff had done and the prices he had paid before, and on the evidence I cannot see that if the plaintiff had known beforehand he would not have charged even more than he is now charging. And in this evidence he is corroborated by two practical carpenters called on behalf of the plaintiff, because they were not asked to value the work in the first instance, but asked what they would tender to do the work for. Well, one tender proved much the same as the plaintiff's charges and the other one tendered for much more, because his price would have been £75. These are two practical men who knew the nature of the work, and they were afterwards asked to value the work, and they said that the work they saw was such as they had tendered for. The witnesses for the defendant were somewhat different. Mr. Cherry may be a good expert, but still he is not the practical man that the witnesses for the plaintiff are. There is certainly another witness for the defendant; he states that he values the work at £48, and I suppose that it was on his valuation that the tender was made, but this witness

is the one that previously tendered for £55. That was his previous tender, but he does not seem to have made a fair allowance for the alterations which the plaintiff had to make after he had done some of the work; nor does he make any allowance for the levelling and bevelling of the stoep. Mr. Moorrees says there was no levelling and bevelling to be done, but Mr. Moorrees was away at the time, and the plaintiff says there was levelling and bevelling to be done, and he charges for that work and no allowance has been made for it. Then the defendant said that he thinks the work was not properly done, but he does not go so far as to say it was done so badly that he could have refused to accept the work, nor does Mr. Moorrees say he would not accept the work; and having accepted it I consider he ought now to pay a fair charge and ought not to expect the Court to scrutinise to a nicety the amount charged. Perhaps there might be a reason for disallowing the sum of £2 5s. charged for the plans inasmuch as the defendant all through, according to the plaintiff's own statement, had stated that he did not wish to have any plans or specifications; but even if the £2 5s. were disallowed there would still be £8 5s. 9d. due above the amount tendered. Under these circumstances judgment must be given for the plaintiff for £57 5s. 9d., and the tender being insufficient, the judgment must be with costs. There is one other point in regard to the tender. The tender at first was so low (£30) that it seemed to show that the defendant wished to get out of the payment of this money. It was a grossly unfair tender. Then, after the tender of £30, the plaintiff was put to the expense of engaging experts to value the work, so that his conduct could not be complained of in refusing the subsequent tender of £48.

Mr. Sheil asked for the plaintiff's expenses as a witness, which were granted.

Their lordships concurred.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorney, C. C. de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

VAN DER WESTHUIZEN v. VAN DER WESTHUIZEN. { 1894. Nov. 21st.

Adultery — Divorce — Division of joint estate—Appointment of receiver.

This was an action for divorce instituted by Mrs. Beatrix Elizabeth van der Westhuysen (born Le Roex) against her husband, Johannes Diederick van der Westhuizen, residing at Bakenskraal, in the division of Oudtshoorn.

The declaration alleged that the parties to the suit were married in community at Oudtshoorn on the 16th March, 1880.

That three children, aged respectively thirteen, twelve, and six, were born of the marriage.

That between the 1st and 30th days of September, 1894, and at Bakenskraal, the defendant committed adultery with one Johanna Helm.

The plaintiff claimed:

1. A decree of divorce.
2. Division of the joint estate.
3. Payment by the defendant of such sum as to the Court might seem meet for the maintenance of the children of the marriage until they attained their majority.
4. Alternative relief and costs.

The defendant in his plea admitted the adultery, but submitted that he was entitled to the custody of the eldest and second child of the marriage, but was willing that the plaintiff should have the custody of the youngest child.

He submitted to the judgment of the Court as to the division of the joint estate, but said that a forced realisation of the estate would cause unnecessary sacrifice and prove ruinous to the parties and to their children, and he tendered to pay the plaintiff the sum of £500 in cash and £500 after twelve months in full discharge of her claims on the estate, which sum of £1,000, he alleged, far exceeded her share after paying and providing for the debts of the joint estate.

He consented to judgment against him with costs, save that he submitted that he should not be condemned to pay the costs of the interdict (restraining him from selling the joint property), as he had no intention of wasting the estate, and offered to give a power of attorney to the plaintiff's father to act as custodian of the joint estate pending the decision of the suit.

He finally submitted to such judgment as to the Court might seem fit in the premises.

Issue was joined on these pleadings.

Mr. Searle, Q.C., and Mr. Webber for the plaintiff.

Mr. Schreiner, Q.C., A.G., and Mr. Currey for the defendant.

Beatrix Elizabeth van der Westhuizen, the plaintiff, said her maiden name was Le Roex, and she was married to the defendant on the 16th March, 1880. After the marriage she and defendant lived for one year at the house of defendant's parents, and after that at the farm Bakenskraal, where they lived together up to September last. There were three children, all girls, aged respectively thirteen, twelve, and six. Their married life was happy until last year. Their unhappiness was caused by a governess named Miss Helm. She had been governess to the children for two years. Her husband preferred the governess's company to her own. At last she told her husband that she (witness) was too ill to stay in the house, and at the end of September last Miss Helm went away. She returned subsequently at her husband's instance, in June of this year, and remained. Witness finally left Bakenskraal on the 27th September last. Miss Helm had left three months previously. On the 27th September last she and her husband went to their church house at Oudtshoorn for Nachtmaal. Her husband left Oudtshoorn on the same evening, and said he would come back again on the day following. He, however, did not return, but a letter was brought to her father, Mr. Hans le Roex. The same evening her father showed her the letter. (Counsel put in the letter.) Her father went out to Bakenskraal the following morning. The two younger children were with her at Nachtmaal, but the eldest was at school at George. Had not spoken to her husband since. She made an affidavit on October 1 that she wished him restrained from parting with his property, and obtained an interdict. She thought he would attempt to sell off his property, because he had told her frequently that he would sell off his property and go away and "then she could see what she would do." For the year before the separation there was much unhappiness. There was another cause besides Miss Helm. She wished for the custody of her children, and was prepared to see that they were properly educated. Her husband offered her £1,000 as her share of the estate, and witness declined because her property was worth more. Her husband told her that the ground, including what he had bought recently, was worth between £8,000 and £9,000.

Mr. Searle said it was not heavily mortgaged, but there were many other debts on the estate.

Examination continued: She wanted half the property. She intended to let the property. There were 600 ostriches. Her father had offered to assist in paying a portion of the debts of the estate. Her father was fairly well off. When she married her husband was not so well off as at present. Her father had assisted her husband considerably. If she obtained a share of the ground and ostriches she could support her children and could do without maintenance money.

Cross-examined by Mr. Schreiner, Q.C.: Her first child was born at Bakenskraal. She had been in ill-health for about a year. Since the occurrence mentioned her husband had often desired to see her, but witness was unwilling; she would not even speak to him. She complained of her husband's attentions to the governess. At the time of the Nachtmaal she had no suspicion of guilt on their part. A few days after the Nachtmaal Miss Helm went away to her home. Miss Helm was not at the farm when she went to Nachtmaal, but after they left she came to the farm, and went away after three days, and had not been there since. Her father had told her that her husband was very anxious for a reconciliation, but she saw no chance of living with him again. Relatives had endeavoured to bring about a reconciliation. She still saw no chance. She would not have the same estimation or the same regard for him. Besides his conduct with Miss Helm she had another complaint against him. She would not speak to him at the present time or forgive him. Her husband bought half the farm for £3,000 two years ago.

Mr. Schreiner, Q.C., said there were encumbrances on this property. The defendant's mother received £103 per annum from it, and there were other charges.

Cross-examination continued: She had not seen the account rendered by her husband since the separation. Did not know that her husband had been sued.

The Chief Justice: If she insists upon it, the Court will have to appoint a receiver.

Mr. Justice Upington: Why not give her half the property, and let her pay half the debts?

Mr. Searle: That is what we want.

Mr. Justice Upington: Will the husband take £1,000, and go away?

Mr. Schreiner said there were objections to that. The wife was not fit to farm.

The Chief Justice: The Court will have to appoint a receiver, as would be done in the case of partnership.

Examination continued: The mother of her husband was a very respectable woman, but she wanted all her three children to herself.

Re-examined by Mr. Searle: She had spoken to her husband before about Miss Helm. She spoke about a letter addressed to him by Miss Helm. It commenced, "My dear darling." She said it was improper. When her father first attempted to effect a reconciliation she was willing to forgive, but now she was not willing, because her husband told her father he would not have her back.

Mr. Searle, Q.C., said the fact was Mr. Le Roux offered to pay Miss Helm £500 to go away, but Mr. Westhuizen would not agree to it.

Alfred Roland said that on the 19th June last he went to the defendant's farm as his foreman, and remained till September 29. On September 28 Mr. and Mrs. Westhuizen went to Nachtmaal. Mr. Westhuizen returned the following day alone. In the afternoon of that day Miss Helm also arrived with Mr. Faure. Mr. Westhuizen saw the cart coming along, and sent a boy to divert the cart to the house. After they had outspanned Mr. Faure left, but Miss Helm remained. He saw Mr. Westhuizen and Miss Helm sitting together. They were very close together, and he had his arm round her waist. Next morning he went into the dining-room. Mr. Westhuizen's bedroom opened into the dining-room, and the door was half open. He heard voices proceeding from the bedroom. Miss Helm's trunk was in the room opened. They were together on the farm that day.

Johannes Hendrik Josephus le Roex, father of the plaintiff, said he lived on a farm in the Oudtshoorn district. He received a letter from defendant on the 28th September. He went to defendant's farm on the following morning. He saw Miss Helm there with defendant, but she then disappeared. Defendant said he would not have plaintiff back again; he had taken another woman, and would not break his promise to her. Witness offered to pay £500 down to hush the matter up, but defendant said, "I shall not break the promise I have made to this girl; she will commit suicide if I do." Witness spoke to him about the marriage obligations, and on a subsequentt occasion he repeated his offer, but defendant would not agree, and repeated that he must keep his promise to the other girl to be faithful to her. Mr. Foster remained behind, and also tried to persuade defendant, and witness went away. Witness had a home for plaintiff, and her children were being well educated. His plan was to put them at the ladies' school at George.

Cross-examined by Mr. Schreiner, Q.C.: After he had offered the £500, and defendant refused, plaintiff would not see her husband. He on one occasion tried to persuade her, but she was absolutely determined not to see her husband. Knew that Mrs. Westhuizen, sen., went to her son, and also that Mrs. Helm took her daughter away. Efforts were made by the clergy to bring the parties together only yesterday, but she would not give way. Now he would never again endeavour to bring about a reconciliation, as he would not exert undue influence on his daughter. Had nothing to say against his son-in-law beyond the adultery, he was a good fellow, and he (witness) was very sorry for the position he was now in. He guaranteed to pay the debts owing by the estate and pay defendant £1,500. Witness had assisted his son-in-law. When the news arrived of her husband's guilt plaintiff was perfectly hysterical, and the affair had had a very bad effect on her health.

Johannes Diedrick van der Westhuizen, the defendant, deposed that he had never been guilty of adultery with Miss Helm until September 29. The letter from her referred to commenced "my dear friend," not "my dear darling." He endeavoured to get Miss Helm away, and had tried unsuccessfully to effect a reconciliation with his wife. She was always kept away from him. He was prepared to take the £1,500; but he wanted the farm, because it was his inheritance. Part of the debt on the farm was due in bills to his father-in-law.

Cross-examined by Mr. Searle, Q.C.: There was unpleasantness with his wife about Miss Helm for about a year. Mr. Faure was going to take her as his governess when they were passing in the cart. When he went back to the farm from the Nachtmaal it was with the object of intercepting Miss Helm on her journey to Mr. Faure's farm.

By the Court: His wife was really a good woman, and of course was fit to have the children. Had not seen Miss Helm since the occurrence.

Counsel having addressed the Court, judgment was delivered.

The Chief Justice said: In this case the adultery is admitted by the defendant, but that admission was not sufficient. It was necessary that evidence should be given to support the admission; that evidence has been given, and it has been proved that the defendant has been guilty of adultery with Miss Helm, and plaintiff is therefore entitled to a decree of divorce. and on that decree of course she is entitled to costs. The next question is as to the division of the property. The ordinary course is, where the parties cannot come to an agreement amongst themselves, to appoint a receiver, who treats the matter as an ordinary partnership and divides the property equally between the two. That is the course the plaintiff herself has

desired in this case, but it is a course which the defendant, through his counsel, has strenuously opposed, and later on an opportunity has been given to the defendant, and his counsel says there is no chance of making a solvent estate out of it if this course is adopted, and, therefore, the only alternative is to adopt the other course suggested during the argument. which is as follows: In view of the division of the property held in community, that the plaintiff be entitled to receive from the defendant transfer, cession, and delivery of all assets of the joint estate, on condition that she pay all the debts owing by the said joint estate, and paying the said defendant the sum of £1,500, in four instalments—£250 at once, £250 on the 1st January, £500 on the 1st July, and £500 on the 1st January, 1896. On the further condition that her father, Johannes H. J. le Roex, gives security to the satisfaction of the Registrar of the Supreme Court for the payment of the said sum of £1,500 to the defendant, and for the protection of the defendant from liability from the debts of the joint estate, appoint Johannes H. J. le Roex as receiver of the joint estate, for the purpose of doing everything necessary for the carrying out of the order, the Court grants leave to either party to apply again to the Court on the failure of the other party to carry out this order. [Coming to the question of the custody of the children, the ordinary rule is that the innocent party gets the custody of the children. There may be special circumstances which induce the Court to depart from this ordinary rule. Well, if it be true that the defendant lived with Miss Helm for only two days and afterwards sent her away, it does not appear to me one of those cases in which the father must be absolutely declared incapable of having the custody of the children, and if they were boys in this case I should consider the question whether it would not be better for them (and, after all, that is the thing to consider) for the father to keep them in his custody; but, seeing they are girls, and that the mother is very anxious to have them and that the father himself raises no strong objection, so long as he has reasonable access to them, we are of opinion that the mother should be declared entitled to the custody of the children, she to bear the cost of maintenance and the defendant to have access to them at all reasonable times and places. As I said at the commencement, the judgment for the divorce will carry costs, and therefore the defendant will have to pay whatever he can pay out of the first £250 he receives. Of course the plaintiff will be entitled to deduct costs from any sums which she has to pay to the defendant under this order.

Mr. Schreiner: I take it that the defendant would have a right to apply to the Court at any future time for the custody of the children if he considered it necessary.

The Chief Justice: That course is always open.

Mr. Justice Upington: I much regret that the parties were not able to see their way to come to terms. It was not one of those gross cases that sometimes came before the Court. I think it is much to be regretted that something has not been done to make a settlement.

[Plaintiff's Attorneys, Messrs. Tredgold & Co.; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

FALCONER V. WALDER. { 1894. Nov. 21st. „ 22nd.

Purchase and sale—Broker's note—Evidence of assent.

While negotiations were in progress between the plaintiff and the defendant, for the purchase of certain houses, and before any definite arrangement as to the terms of payment had been arrived at, the plaintiff's broker sent a broker's note to the defendant after business hours in the afternoon, but the defendant returned it on the following morning claiming that interest on unpaid purchase money should be five, and not six, per cent.

The broker sent the note back to the defendant, who did not again return the note, but sent a message, which was duly delivered, to the broker, saying that he repudiated the note unless five per cent. interest were agreed upon.

Held that, *as the broker's note was returned by the defendant within a reasonable time after he first received it, and as it was again repudiated after it was sent back to him, the mere subsequent retention of the note was not sufficient evidence of an acceptance by him of the terms stated in the note.*

This was an action for £1,500, the first instalment of the purchase price of £6,000 of eight houses in Hopeville and Courville-streets, Cape Town.

The plaintiff resides in Cape Town and the defendant in the Paarl.

The declaration alleged that the plaintiff sold to the defendant on the 3rd August, 1894, through Mr. Spolander, the broker, the houses

in question. In terms of the broker's note the plaintiff had to effect certain repairs and additions, and pay the transfer expenses. The defendant to be entitled to rent from the day of sale, also that payment of the purchase price was to be made as follows: £1,500 on completion of additions and repairs, £500 more within twelve months from the date of sale, the remaining £4,000 to remain on first mortgage.

The plaintiff alleged that he had effected the additions and executed the repairs, and he claimed: (*a*) payment of the sum of £1,500; (*b*) alternative relief with costs.

The defendant pleaded that no concluded contract was entered into for the purchase of the property. He said he was willing to purchase the property for £6,000 provided the £4,000 should remain on mortgage at 5 per cent., and that the consent of the mortgagee of the property should be obtained to the sale, and that a formal contract or deed of sale should be drawn up.

He alleged that the plaintiff refused to agree to the said £4,000 remaining upon mortgage at 5 per cent., and that the other conditions referred to above were not carried out.

The replication was general.

Mr. Rose-Innes, Q.C., and Mr. McLachlan appeared for the plaintiff.

Mr. Searle, Q.C., and Mr. Tredgold for the defendant.

Mr. Andrew Black Spolander deposed that he was a broker, residing in Cape Town. In August last he was in partnership with Caffyn & Pos. Heard the defendant wished to buy landed property in Cape Town. On the 21st July he saw the defendant in Plein-street, and made an appointment to look at some houses belonging to the plaintiff. On the 3rd August met the defendant and plaintiff by appointment; defendant looked at the houses. Mr. Caffyn, one of witness's partners, was also present. The plaintiff took defendant over the houses (in Hopeville-street), and defendant said he would take the houses for £6,000 provided the plaintiff gave clear transfer and made certain alterations and did certain repairs. The defendant made his own terms of payment; £1,500 was to be paid when the alterations were completed; £500 twelve months after date of sale; and £4,000 remain on first mortgage on the property. Plaintiff acceded to those terms. Caffyn made a note at the time. Defendant said he would come down to witness's office by five o'clock that day, but he did not come, and then witness made out the broker's note (produced). He sent the broker's note to a butcher's shop in Plein-street where defendant stayed. Mr. Pos took the note up. Defendant came to witness's office at 5.30, and witness told him the note had been sent up. Witness read the counterfoil to him, and he raised no objection. Next day, however, he wanted witness to fill in 5 per cent. as the interest on the mortgage, and to say that the buildings should be fully completed. Plaintiff refused point blank to do this. Witness wrote to defendant on the 4th August to this effect, enclosing the broker's note which defendant had left at witness's office. The broker's note had never been returned since by the defendant. On the 21st August defendant came to witness's office, and witness, the plaintiff, the defendant, and Mr. Caffyn met at the houses. The alterations were completed. The defendant wanted certain things done, but plaintiff refused to do them, and said to defendant, "It is your property now." Plaintiff, when he wanted these small things done, said he had £1,600 on him, and was ready with the money. Nothing was said about any repudiation of the contract. The current rate of interest was 6 per cent. Half of an appraised valuation, but not two-thirds, might be obtained at 5 per cent.

Cross-examined by Mr. Searle: Defendant did not understand English, but plaintiff understood Dutch. However, he thought both of them knew what was going on. Mr. Caffyn acted more than witness as an interpreter between them. Before ever they viewed the property, 5 per cent. was mentioned by the defendant, who asked if the money could be obtained at 5 per cent. Witness told him his firm would try and obtain it at that rate. Defendant did not say he would come to witness's office at five o'clock about the matter. Witness presumed he was coming for the broker's note. The seller was in witness's office at five. When defendant came there at 5.30, witness told him he had sent on the broker's note. Would swear positively he did not come back with the broker's note that same evening. He came on the next day and objected to the note because the 5 per cent. interest on the bond was not stated. Witness did not see him again for some days. Sent the note by hand to Rattray's shop in Plein-street. Remembered getting a letter from Mr. Rattray, but would swear it was not in reply to the letter enclosing the broker's note. Did not receive a letter from defendant (per Rattray) to the effect that he would not take the property unless the mortgage was at 5 per cent. Could give no explanation as to why he wrote to Rattray on the subject of the 5 per cent. Did not know that plaintiff was not in a position to give transfer. Defendant was satisfied with the premises, but wanted further alterations. There was a bond on the property of £3,000 at 6 per

cent. Witness thought the bondholder would perhaps advance the other £1,000, but did not know who the bondholder was. Witness was very anxious to get the matter through, and to get his commission.

Re-examined by Mr. Innes: Knew there was a bond on the property already, but knew nothing about plaintiff's private arrangements. Was quite positive defendant did not bring the broker's note back on the same evening that it was sent.

Mr. Robert Augustus Falconer, the plaintiff, said the property in the Gardens was not quite complete at the time of the sale. As the result of negotiations the meeting took place at the houses. He and the defendant at that interview understood each other, although he (witness) only spoke a little Dutch and defendana little English. No rate of interest was ment tioned at the sale. Witness at the time was paying 6 per cent. on £3,000. Witness told Spolander to take a note at the time of the sale, so as to know what to put down in the broker's note. Witness got his broker's note that same evening from Spolander. The next morning Spolander told him that defendant wanted the money at 5 per cent., and witness replied, "How can he have it at 5 per cent. when I am already paying 6 per cent." The work on the houses had been done according to the agreement. About a fortnight after the sale he said he would try to get the £4,000 at 5 per cent.; he did so, but failed. The additions to the buildings asked for by the defendant three weeks after the sale would have been very expensive. He thought defendant at that time wanted to tempt him (having the money with him) into doing what he had not arranged to do. Defendant said he was "off" the bargain, as one of the tenants had told him there was no water. Witness replied he would sue him, whereupon defendant said he could do as he liked, as he (defendant) was a unrehabilitated insolvent.

Cross-examined by Mr. Searle: Defendant could understand English enough to know what they were talking about at the time of the sale. Never pledged the broker's note to the bank, nor raised a penny on the note. Defendant could get transfer to-morrow morning.

Re-examined by Mr. Innes: He was still able to arrange the £4,000 bond at 6 per cent., and to give transfer on the morrow.

Meandert Pos, partner in the Translation Bureau and Agency in August last, said that on the 3rd August he delivered a letter addressed to Mr. Walder to Mr. Rattray. That letter contained the broker's note.

By the Court: He and Spolander were partners. Did not know why they called the business the Translation Bureau instead of Spolander & Pos. It was an inspiration.

Harry Gordon Caffyn gave corroborative evidence.

Cross-examined by Mr. Searle: They expected defendant to come and fetch the broker's note at five o'clock. Nothing was mentioned about a broker's note, but still defendant was to come round.

Ferdinand Walder, the defendant, said that from the first he said he could only pay 5 per cent on the bond. When they were on the property the first time, witness said he would think it over, and go round to Caffyn's office at five o'clock. He accordingly went there at ten minutes past five. His intention was to say he would not have the property, but they told him the broker's note had been sent on. He afterwards saw the note, and went back to Caffyn's with it as he was not satisfied with the terms of the note. Left the broker's note behind at Caffyn's that night, and went to the Paarl by the nine o'clock train the same night. He always said he would not take the property unless at 5 per cent. On his return from the Paarl, he found that the note had been returned by Caffyn. He then had a letter written by his daughter to his son-in-law conveying a message to Caffyn that he repudiated the note, as it contained no stipulation as to 5 per cent. interest on the bond.

Cross-examined by Mr. Innes: Witness was a butcher. His son carried on his business. Did not know what a broker's note was. Regarding the defective alterations, he complained verbally about them. If the alterations were now done properly, and provided he could get the bond at 5 per cent., he would still take the property. When he went round to Caffyn's office the counterfoil of the broker's note was not read to him. Subsequently he found the broker's note at Rattray's, and returned to Caffyn's office with it.

James Rattray, son-in-law of the defendant said that he sent on a letter written by one of the daughters of the defendant, stating that he would not take the property unless at 5 per cent. on the bond.

Caffyn was recalled and examined by the Court. Did not have a conversation with Mr. Walder about rate of interest before the sale was completed. Was sure the defendant came to his office the next morning with the broker's note.

Mr. Rose-Innes, Q.C., for the plaintiff: The contract as contained in the broker's note has been clearly proved.

The Chief Justice: You must rely on the oral contract, as the broker's note was never accepted by the defendant.

But the defendant has the note now in his possession.

The Chief Justice: The mere fact of his having possession of the note is not proof of acceptance.

There was a binding agreement before the note was signed.

He cited *Stanford's Trustees* v. *Ryan* (3rd December, 1885), not reported.

Cur ad vult.

Postea (22nd November). The Court delivered judgment.

The Chief Justice said: In this case the plaintiff claims the sum of £1,500 as being the first instalment of the purchase price of eight houses, which the plaintiff alleges the defendant purchased from him on the 3rd August last. Now, it is common cause that on the 3rd August the defendant by appointment met the plaintiff on the premises, in the presence of plaintiff's agents, Spolander and Caffyn, and that negotiations then took place regarding this purchase. It is common cause also that the defendant was prepared to pay £6,000 for the houses, provided that certain alterations were made, and that the parties could come to some arrangement as to the terms of payment. The terms of payment were an essential portion of the sale, because the defendant admitted he had not the cash to pay; it was not to be a cash transaction, and some arrangement had to be made as to the mode in which the £6,000 was to be paid. So far the parties are agreed, I think. But then comes the dispute as to whether any arrangement was made as to the terms of payment. According to the defendant, there was no complete and final arrangement as to the conditions upon which the sums were to be paid. The defendant's statement is that, after some negotiations, he came to the conclusion that the other side was rather too sharp for him, and in order to gain time he said he would return at five o'clock to Caffyn's office, and that at five o'clock arrangements could be made. According to the plaintiff, the thing was all settled; the bond for £4,000 was to be passed, but nothing was said as to the interest. It is clear that the plaintiff insisted that the interest was to be 6 per cent., and it is equally clear that the defendant thought the interest should be 5 per cent., and Mr. Caffyn admits that before the parties separated this question of interest was mooted, and that Mr. Spolander then said that he would endeavour to get the money at 5 per cent. Now, I have carefully read all the evidence as to what took place and the conclusion I have arrived at is that before five o'clock, at all events, there was no final and binding contract between the parties on which the defendant can now be sued, and the only further question is was there such a subsequent acceptance by the defendant, by means of the broker's note, as to bind him to the sale. Well, it was arranged that the defendant was to go back at five o'clock; both the plaintiff and defendant were to go to the office at five o'clock. Spolander says it was for the purpose of receiving the broker's note, and the defendant says it was for the purpose of finally settling the terms of the contract. The defendant did not arrive precisely at five o'clock; he says he came ten minutes after. Spolander says defendant came about half an hour afterwards. Now Spolander was rather in a hurry to send the broker's note, because he did not give the defendant more than half an hour's grace, when he sent the broker's note to Mr. Rattray, and the broker's note must have crossed the defendant, because on his arrival it had already been sent. Now the defendant denies that the counterfoil was read to him. Spolander says he read the counterfoil, but whether it was read or not, I do not think that seriously affects the question, because the defendant appears to be a very illiterate man, and it is quite clear he could not understand the full terms of the broker's note, which was hurriedly read to him by Mr. Spolander. He then said he would go back and see the broker's note. He found the note, and according to his statement he returned it the same day to Spolander & Caffyn. This also is denied by them; they say the broker's note was only returned the following morning. Now we will assume that they are right, and that the broker's note was only returned on the following morning. Well, it was past business hours on the 3rd when the broker's note was sent to the defendant, and his only returning it on the following morning could not be considered as such an acceptance on his part as to bind him to the terms of the note. He returned it at a reasonable time on the following morning—although I am inclined to believe the evidence he gives that he returned it the same evening—and he meant alterations to be made in the broker's note with regard to the rate of interest. He was not satisfied with the terms, and plaintiff admits that Spolander consulted his client, but Spolander says the plaintiff was unwilling to make any alteration, whereupon Spolander sent the broker's note in a letter addressed to the defendant, but sent to Mr. Rattray in Cape Town. Mr. Rattray says he at once posted it to the defendant at the Paarl, and that within a few days afterwards he received a letter from the

defendant, written by defendant's daughter and addressed to him (Rattray), in which the defendant practically repudiated the broker's note and wished alterations to be made in it, altering the interest on the bond from 6 per cent. to 5 per cent. Now, it is a strong circumstance that in his evidence Spolander said nothing about this letter at all till cross-examined, but treated it as a matter of really no importance, and then the letter has never been produced. Well, it was a letter to my mind of considerable importance to them, and was at once handed over by Mr. Rattray to Spolander, and I should have thought it was a letter he would have kept; that letter is not forthcoming, and therefore we are quite justified in accepting the secondary evidence given both by defendant and Mr. Rattray that it contained a repudiation of the sale, and that the interest was to be 5 per cent. instead of 6 per cent. Under these circumstances, it is not for the plaintiff to rely upon the broker's note as proof of the contract. The plaintiff returned it on the first opportunity after it was delivered to him, but when it was returned to him he did not again send it back, because that would have been only playing battledore and shuttlecock with the note. He says he repudiated the note unless the rate of interest on the bond was altered from 6 to 5 per cent., and therefore there has been no such acceptance of the broker's note by the defendant as to render him liable to pay these amounts. Judgment must therefore be for the defendant with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Sauer & Standen; Defendant's Attorney, Gus. Trollip.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

ADMISSION. { 1894. Nov. 22nd.

Mr. Sheil moved for the admission of Mr. Ferrar Reginald Mostyn-Cleaver, barrister-at-law, as an advocate.

Mr. Cleaver took the oath of allegiance and was duly admitted.

PROVISIONAL ROLL.

STANDARD BANK V. SHEARD.

On the motion of Mr. Rose-Innes, Q.C., the final order of adjudication was decreed, and Mr. Lourens appointed provisional trustee.

COETZEE V. BARTIE.

Mr. Shippard moved for provisional sentence for £117 and £147 on two promissory notes, with interest at 8 per cent. from the due date.

Granted.

MASTER V. PRINS AND WEINGARTZ'S EXECUTORS.

Mr. Giddy moved for an order compelling defendants to file accounts.

The Court made the usual order.

BERGH V. BEEDLE.

Mr. Buchanan moved for a decree of civil imprisonment against the defendant.

Granted.

HARRIS V. ROSSOUW'S EXECUTOR.

Mr. Graham moved for judgment for £19 1s. 9d. with costs.

Granted.

BEEDLE AND CO. V. SOLOMON.

Mr. Jones for plaintiff. Application for judgment for £75, less £50.

Granted.

MEYER'S TRUSTEE V. JONES.

Mr. Juta for plaintiff. Application for judgment for sum of £378 1s. 2d.

Granted.

EILENBERG V. JACOBSON.

Mr. Tredgold for plaintiff. Application for judgment for £1,069 15s. 2d. for goods sold and delivered and interest at 8 per cent.

Order granted, with interest at 6 per cent.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE DOUGLAS MCKENZIE, BISHOP OF ZULULAND.

Mr. Tredgold moved for authority to the liquidators of the Cape of Good Hope Bank to allow a claim to be proved and filed in respect of a balance due to the said estate, by the nearest friend of the said late Bishop, there being not sufficient time

to obtain the necessary authority from the executrix before the final day for filing claims.

Granted.

BILBROUGH V. HILL.

Mr. Benjamin moved for an order postponing the trial of the suit between the parties, set down for the 29th inst., until such time as a commission *de bene esse* applied for by the defendant to examine the plaintiff, can be returned, and further for an order that the address of the plaintiff be disclosed.

Trial postponed to 1st February.

THE PETITION OF SPENCER D. DICKSON.

Mr. Watermeyer applied for leave to the petitioner to sue by edictal citation in an action against his wife for restitution of conjugal rights, failing which for divorce, by reason of her malicious desertion, and forfeiture by her of her half-share of the property by virtue of the marriage in community.

Granted; personal service.

IN THE ESTATE OF THE LATE MICHAEL A. SCHMIDT.

Mr. Graham applied for an interdict restraining the executors from alienating any portion of the said estate, or acting on an order obtained from this Court on September 18 last in regard to the taking over by the heirs of certain assets, pending an action about to be instituted by the widow of the said Schmidt for a declaration of rights.

The Court granted a rule *nisi* calling on respondent to show cause why the order should not be granted. Rule to operate as interim interdict.

IN THE ESTATE OF THE LATE GERHARDUS P. SWART.

Mr. Joubert applied for authority to the Registrar of Deeds to register a bond executed by the mother and natural guardian of the minor Margareta C. Swart, one of the heirs, for a sum not exceeding the *pro rata* share of the price at which the farm Holdrift is to be taken over, for the purpose of paying the said purchase price and taking over the property.

Granted.

INCORPORATED LAW SOCIETY V. WALKER. { 1894. Nov. 22nd.

Attorney—Conviction on charge of theft—Suspension—Certificates.

Where an attorney had appropriated to his own use a cheque which had been paid to him in his capacity as secretary of a Divisional Council, and was subsequently tried and convicted on a charge of theft,

The Court, *on an application by the Incorporated Law Society, suspended the attorney from practice until the further order of the Court, and directed that no application should be made for the reinstatement of the attorney until three years had elapsed from the date of the Court's order.*

The Court *further directed the attorney to deliver his certificates to the Registrar.*

This was an application on the following notice of motion addressed to the respondent, John Henderson Walker, an attorney and notary of the Supreme Court, who was convicted of the crime of theft on the 18th October, 1894, and sentenced to six months' imprisonment with hard labour:

Be pleased to take notice that application will be made to this Honourable Court on Thursday, the 8th day of November, 1894, at ten o'clock in the forenoon, or so soon thereafter as counsel can be heard, at which time you will be required to show cause, if any, why you shall not be struck off the roll of attorneys and notaries of this Honourable Court on the ground that on the 18th October, 1894, you were convicted of the crime of theft and sentenced to six months' imprisonment with hard labour. You will also be required to hand up your certificates of admission as an attorney and notary to the Registrar of this Honourable Court, and to show cause why you shall not pay the costs of this application.

Annexed to the notice of motion was the affidavit of the president of the Law Society, which set forth that the respondent was on the 18th October, 1894, convicted of the crime of theft and sentenced to six months' imprisonment with hard labour.

The respondent filed an affidavit, in which he admitted the allegations contained in the affidavit of the president.

He alleged that prior to his conviction, besides carrying on the business of an attorney and notary, he discharged *inter alia* the duties of secretary of the Divisional Council of Stellenbosch, secretary of the Municipality, and Deputy Sheriff. All his occupations being carried on in the one set of offices.

That in the course of his dealings he made use of a certain cheque handed to him as secretary of the Divisional Council. The said

cheque was for an amount of £57 15s. That when he so made use of the cheque he honestly intended to forthwith replace the amount.

The affidavit went on to state: "It is a matter of profound sorrow to me that an attorney of this Honourable Court should have been so sentenced, and if it be the view of this Honourable Court that no measure of punishment short of that prayed for by the applicant will meet the case I cannot do other than accept the situation, however calamitous to me the consequences may be." "If on the other hand this Honourable Court should be of opinion that a period of suspension, or other open order, will meet the case, then I respectfully crave the favourable consideration of the Court."

"Under all the circumstances I cannot do other than leave myself in the hands of the Court, but I crave leave to point out in addition to what I have already said that my offence was not committed by me in my capacity as an attorney and notary, and that I have spent the best years of my life in preparing for the professions of which I am a member, and in which I have practised for several years with good repute, and that I have a wife and infant child wholly dependent on me."

Mr. Searle, Q.C., in support of the application: The motion comes before the Court under section 22 of Act 27 of 1883 for an order striking the respondent off the rolls. Under the circumstances of the case seeing that the respondent pleaded guilty to theft of a considerable sum of money which he held in trust for the Divisional Council the Law Society did not feel justified in making the application in any other form than the present. At the same time, should the Court think that under the circumstances an order suspending the respondent from practice for a period would meet the justice of the case, I am not instructed to offer any objection to such course. If such order be granted the Law Society would wish it to be on one condition, viz., that the respondent should not obtain the order as a matter of course, but should make application to the Court at the end of the period of suspension, giving notice to the society. This seems reasonable, so that his conduct during suspension can be investigated. Further, the certificates should be given up to the Registrar.

Mr. Rose-Innes, Q.C., for the respondent: Mr. Walker is of course in the hands of the Court, but under the circumstances it does seem that a period of suspension would meet the justice of the case. He cited *In re Wearne* (2 Q.B.D. (1893), 439). The certificates will be handed to the Registrar as soon as they have been obtained from the trustee in the respondent's insolvent estate.

The Chief Justice said: The case was tried before me and the respondent pleaded guilty to the charge of theft. It was clear to me that the man had been exposed to temptation and that he fell. The respondent is a very young man, and we think that a chance should be given to him to redeem his character hereafter, and we think, therefore, that it would not be right to strike him off the rolls altogether, but to allow him to apply at some future time to be placed back on the list of attorneys. The respondent will be suspended from practising as an attorney of the Supreme Court until the further order of the Court, but no application must be made within three years from this date. The Law Society must have notice of any such application. The respondent will give up his certificates, as soon as he has obtained possession of them, to the Registrar.

Their lordships concurred.

[Attorneys for the Law Society, Messrs. Van Zyl & Buissinné; Respondent's Attorney, G. Montgomery-Walker.]

THE PETITION OF CATHERINE C. VAN RENEN.

Mr. Watermeyer applied for authority to the liquidators of the Cape of Good Hope Bank to accept proof of certain note of the said bank in the possession of petitioner, notwithstanding that the date for the proof of such claims has elapsed.

Granted.

IN THE ESTATE OF THE LATE THOS. CUTTING.

Mr. Shippard applied for authority to the Registrar of Deeds to cancel certain bond passed by the said Thos. Cutting and Henry Donough in favour of M. Andries, by whom it was ceded to Joseph Maynard for £75, hypothecating certain lot of ground, known as Voorduine, in the district of the Cape, the said bond having been paid, but never written off the debt registry.

The matter was ordered to stand over for the report of the Registrar of Deeds. On the 29th November the application was renewed and the Court granted the order as prayed.

Ex parte FISK.

THE BISHOP'S CHURCH AID FUND.

Mr. Tredgold applied for authority to the liquidators of the Cape of Good Hope Bank to file and allow a claim for the sum of £95 5s. 3d., deposited to the credit of the said

fund in the Port Elizabeth branch of the bank, notwithstanding that the time for receiving such claims has elapsed.

Granted.

Ex parte SCHOEMAN. *Re* HONIBALL. 1894. Nov. 22nd.

Curator bonis—Insanity—Want of proof.

The Court refused to appoint a curator bonis to the estate of a person alleged to be insane, there not being sufficient evidence before the Court of the insanity.

This was the petition of Philip R. B. Schoeman, a farmer and general dealer residing at the Gouritz River Bridge in the district of Mossel Bay.

The petitioner is the son-in-law of one John Robert Honiball, a farmer residing at Braakfontein in the District of Mossel Bay.

On 9th September, 1889, Honiball granted the petitioner a general power of attorney, since which time he has carried on Honiball's business.

The petitioner alleged that lately Honiball had for considerable periods fallen into a state of insanity or imbecility which rendered him unfit to manage his own affairs.

The petitioner alleged that he would soon have to sign certain documents on behalf of Honiball, but that he had been advised that he could no longer act under the power, that he consequently spoke to Honiball and his wife, who both agreed that he should be appointed *curator bonis* for the benefit of the estate.

That Honiball was at present 78 years old, or thereabouts. The prayer was that the petitioner might be appointed *curator bonis*.

There was no medical certificate as to Honiball's mental condition.

Mr. Buchanan for the applicant.

The Court made no order.

The Chief Justice said: There is not sufficient evidence of Honiball's insanity to justify the Court in making any order on this application. If the appointment of a *curator bonis* is necessary in the interests of the estate, proceedings can be taken in the ordinary way to have Honiball declared of unsound mind.

[Applicants' Attorneys, Messrs. Findlay & Tait.]

Re MOSTERT. 1894. Nov. 22nd. Nov. 29th.

Curator bonis—Deaf mutes.

Curator bonis *appointed to manage the property of deaf mutes who were incapable of managing their own affairs.*

This was the petition of Anna Marthina Helena Stadler, widow and executrix testamentary of the estate of the late Cornelis D. G. Mostert, of Mowbray, Cape Division.

The petition set forth that the petitioner and her late husband executed a joint will on 1st June, 1864, whereby the survivor is entitled to a child's share in addition to her half of the estate and each of the children of the marriage is entitled to one-sixth of the estate.

There are only two children of the marriage, both of whom are deaf mutes or nearly so, and are besides incapable of managing their own affairs.

Mr. Molteno for the petitioner.

The Court granted a rule *nisi* returnable on Thursday, the 29th November, 1894, calling upon the children to show cause why the Board of Executors should not be appointed curators of their property on the ground of their incapacity to manage their own affairs.

The rule to be explained to the children by some one, not being the petitioner, who is understood by them.

At the suggestion of the Court the rule was explained to the children by Mr. Molteno and on the return day it was made absolute.

[Petitioner's Attorney, C. C. de Villiers.]

In re THE NORTH-EASTERN BULTFONTEIN, IN LIQUIDATION. 1894. Nov. 22nd. Nov. 23rd.

Winding up by Court—Voluntary winding-up—Powers of liquidator—Sale of assets—Compromise—Scheme of reconstruction—Minority of creditors.

In the course of the winding-up by the Court of the B. *Company a scheme of reconstruction was adopted by a majority of the creditors and contributories, under which a new company was to be incorporated with the same name as the old, but with a larger share capital, and the unsecured creditors were to receive debenture stock at par for their claims as proved.*

A minority at the meeting, being unsecured creditors, objected to the scheme, and upon application to the High Court of Griqualand by the debenture holders of the old company for a sanction of the scheme the minority appeared to object.

Held, on appeal, *that the High Court properly refused to sanction the scheme as not being within the powers of the liquidator of a company in the course of being wound up by the Court and not voluntarily.*

This was an appeal from a judgment of the High Court of Griqualand West refusing an application made *ex parte* by the London and South African Exploration Company, Limited, for the sanction of the High Court of Griqualand to a scheme for the reconstruction of the North-Eastern Bultfontein, Limited (in liquidation).

It appeared from the petition that on or about the 12th of July, 1893, a bond was duly registered in the Deeds Registry in Kimberley to secure to the debenture holders of the North-Eastern Bultfontein Company the sum of £50,000 and interest, and a further amount of debentures have been issued by the company, making the total debenture debt of the company £89,000 or thereabouts, the balance in excess of the £50,000 being secured only by the usual debenture trust deed in England, but not by bond registered in this colony.

On or about the 31st August, 1893, the company was ordered by the High Court to be wound up, and an official liquidator thereof appointed.

The petitioners have proved in the said liquidation, and are creditors therein for upwards of £33,000. A portion of their said claim is secured to them by their landlord's lien for rent.

On or about the 27th day of October, 1893, it was ordered by the Chancery Division of the High Court of Justice in England (on a petition for the winding-up of the company pretented on or about the 25th August, 1893), that the voluntary winding-up of the company, which had been resolved on at meeting of the shareholders of the company held on the 25th September, 1893, should be continued under the supervision of the Court.

A scheme for the reconstruction of the company has been prepared in London. All the debentures in the said scheme referred to are to rank *pari passu* as a first charge.

The said scheme has been approved by the Chancery Division of the High Court of Justice in England, and made binding on all parties within the jurisdiction of that Court if concurred in by the creditors in South Africa and sanctioned by the High Court.

The said scheme was prior to being presented to the English Court unanimously sanctioned by the debenture stockholders, creditors, and shareholders of the company at meetings of these various classes of persons held in London on the 25th of May, 1894.

In accordance with the directions given to him by the High Court on the 16th July, 1894, the official liquidator convened and held in Kimberley on the 3rd day of August, 1894, a meeting of the South African creditors of the company, at which, as appears from the official liquidator's seventh report hereinbefore referred to, fifteen creditors (whose claims amount to £47,728 1s. 5d. in the whole) voted for the adoption of the scheme, and six creditors (whose claims amount in the whole to £13,150 7s. 5d.) voted against such adoption.

The petitioners alleged that they were desirous that the said scheme should be sanctioned by the High Court, and believed that it would be to the best advantage of all parties concerned that the scheme should be so sanctioned and finally adopted.

The petitioners prayed:

1. That the High Court might be pleased to sanction the said scheme, and direct that the same be binding on all parties interested and within the jurisdiction of that Court, and that the same be carried into effect as soon as possible.

2. That the costs of this application be costs in the winding-up of the said company.

3. For such further or other relief in the premises as to the Court might seem meet.

The application was supported by the Standard Bank and other creditors, and was opposed by the Kroonstad Coal and Estate Company and by the Bultfontein Mining Board.

The grounds upon which the former company mainly opposed were: (1) That on the 23rd February last Mr. Alfred Mosely laid before the South African creditors a scheme for the reconstruction of the company, which was more beneficial to the creditors than the one now asked to be sanctioned, under which, they alleged that the debenture stock of the company would be practically worthless; and (2) that at the meeting held on the 3rd August, 1894, the creditors composing the minority before the close of the meeting entered into a formal protest against the resolution to accept the scheme of reconstruction then proposed, on the grounds *inter alia* that the acceptance of such a scheme was illegal in the absence of the unanimous assent of the creditors, the majority having no power to bind the minority, which protest they submitted was good in law.

The Court refused the application without costs, but allowed one set of costs for the opposing creditors and the official liquidator, which were ordered to be costs in the liquidation.

From this judgment the applicants now appealed.

Mr. Searle, Q.C. (with him Mr. Currey) was heard in support of the appeal.

He cited and discussed the various sections of the Companies Act of 1892 bearing on the subject of sale and compromise, and referred to the following cases: *In re Agra Bank* (L.R. 12,

Eq. 509); *In re C. B. C. of India and the East* (L.R. 8, Eq., 241); *Bank of H. C. & I.* v. *E. F. Association* (2 P.C.A., 482); *In re E. S. & A. Chartered Bank* (3 Ch. Div., (1896), 385).

Mr. Rose-Innes, Q.C., and Mr. Solomon, Q.C., for the Kroonstad Coal and Estate Company and other creditors, referred to *Bird* v. *Bird's P. D. & U. Sewage Co.* (9 Ch. App., 358): *Pearson's Case* (7 Ch. App., 309); *Re Albert Assurance Co.* (6 Ch. App., 381); *In re Alabama Railway Co.* (1 Ch. Div. (1891), 213).

Mr. Juta, Q.C., for the official liquidator.

The appeal was dismissed.

The Chief Justice said: I am of opinion that the appeal must be dismissed and my reasons may be stated in very few words. The main object of the winding up of the company was to effect a legal distribution of the assets of the Company among the creditors, and for that purpose, it became the duty of the official liquidator to realise such assets. He has no powers beyond those given to him by the Act of 1892, nor can the Court confer upon him powers which it is not authorised by the Act or by the general law to confer. Now let us look at the scheme of reconstruction which the Court below was asked to sanction. A new company is to be incorporated with the same name as the existing one but with a larger share capital. Debenture stock holders are to accept debenture stock of the new company at *par* in discharge of principal due, and to waive interest to the date of the registration of the new company. The first year's interest can, at the option of the company, be funded in debenture stock at *par*, and in case of default during the next four succeeding years the interest will accumulate, but the holders will have no right of foreclosure or other action. The fifth paragraph provides that unsecured creditors of the company must accept debenture stock of the new company at *par* for their claims as proved. The creditors who oppose the scheme are unsecured creditors. Are they to be coerced into accepting debenture stock which in their opinion may be worthless? I do not for a moment say it would be worthless, but to the creditors it may be a matter of moment to receive immediate payment of such dividend as can be realised out of the assets rather than debenture stock at *par* of which they cannot enforce payment of interest or capital for four years to come. I have carefully read the provisions of the Act of 1892 relating to the subject but I have not found any which enables the liquidators, even when supported by a majority of creditors, to coerce a minority into accepting a scheme like the present. It is certainly not a sale of the property such as the liquidator can effect under section 149, nor is it a compromise in terms of section 208. The only sections which can be construed as contemplating some such scheme of reconstruction are the 204th and 205th, but both those sections refer only to companies which are in the course of being wound up voluntarily. As to the 214th section, which has also been relied upon by the appellants, it does not authorise the Court to confer on a majority of the creditors powers which independently of that section they do not possess. The opinion of the creditors or contributories, or of both, may from time to time be of great assistance to the Court in the exercise of the discretionary powers conferred upon it by the Act, and the 214th section provides a convenient mode of ascertaining such opinion. That being my view of this case it becomes unnecessary to inquire whether the application ought to be entertained at all without the approval of the scheme on the part of the liquidator. Even if he had approved of it, the scheme is not such as can be sanctioned in the face of the opposition of the objecting creditors, and the appeal must therefore be dismissed with costs.

Mr. Justice Buchanan: I concur that this appeal must be dismissed with costs. In considering the Companies Act it must be borne in mind that it refers to two kinds of liquidation, one voluntary and the other compulsory by order of the Court. Compulsory liquidation is assimilative and analogous to liquidation in insolvency and distribution of an insolvent estate, and the order of Court under which the company is placed under liquidation restricts the rights of creditors, and stops them from enforcing their claims at law, but the rights of creditors are in no way further restricted than the law allows. Unless the Companies Act expressly states that the majority should bind the minority, there should be no further restriction than the liquidation rendered necessary. I was impressed with Mr. Searle's argument at first, that taking sections 204 and 214 together they might in the case of compulsory liquidation confer on the Court powers as shown under the English Act, but on careful perusal, I am convinced that the meaning of the 214th section is that it is merely a consultative section. It provided means for the parties interested to consult before the Court comes to any decision connected with the liquidation. It is not confined to confirming or disallowing any acts of the liquidator, but to enable the Court to ascertain the views of the parties to guide the Court in coming to a decision. The

section provides that the Court may generally direct what shall be submitted to meetings held under the section, how the proceedings shall be carried on and who shall preside, and the section then expressly enacts that any resolution of the creditors or contributories shall not be binding upon the Court. As to the merits of the scheme, I do not think it necessary to enter, but I think, after looking over the papers, that had this Court been sitting in appeal on the scheme itself, I may say that it would not have reversed the decision if the Court below had refused to sanction the scheme. This appeal must be dismissed on the first ground, that the minority of creditors cannot be overridden by the majority.

Mr. Justice Upington: My view of the case is the same. Until I heard Mr. Innes I was inclined to hold adversely to the respondents, but on careful consideration of the question, I have arrived at the conclusion that the appellants cannot succeed. At the same time, it strikes me as a curious anomaly that under the 205th section, if there is a voluntary winding-up, the Legislature should give validity to the acts of the majority of creditors, whereas when there is a compulsory winding-up under the Court, it would appear that there is no power whatever to enforce the same provisions. But so it is and being the legislation of the country, I can only abide by it.

[Appellants' Attorneys, Messrs. Fairbridge & Arderne; Respondents' Attorneys, Messrs. Scanlen & Syfret and Van Zyl & Buissinné.]

WATSON V. HAUPT. { 1894. Nov. 23rd.

Building contract—Balance of account—Action.

This was an action instituted by Thomas Watson, builder and contractor, of Claremont, against Pierre François Haupt, for £48 10s. 6d.

The declaration alleged that in the month of March, 1894, the parties entered into a contract by which the plaintiff agreed to do certain building work for the defendant at Newlands for the sum of £165, the defendant agreeing to pay the plaintiff sums on account as the work proceeded. That the plaintiff performed his part of the said contract, save and except that the plaintiff has not put up certain barge boards. The said boards are ready to be put up, and the plaintiff is ready and willing to put them up, but has delayed completing the said work at the request of the defendant. The value of the said boards and of the labour of putting them up, is £5.

The defendant has paid the plaintiff the sum of £140, but has refused to pay the balance, £48 10s. 6d.

On 31st October last the defendant was arrested by the plaintiff as he was leaving the Colony without having paid the said balance, and the writ was confirmed on the 1st November, 1894.

The plaintiff claimed (*a*) the sum of £48 10s. 6d., with interest *a tempore morae*; (*b*) alternative relief with costs, including the cost of the arrest proceedings.

The defendant in his plea admitted the contract, but alleged that the price was to be £150.

He said that the plaintiff failed and neglected to complete the work, whereupon the defendant proceeded with the work himself, and expended thereon £18 12s. 8d. on labour and materials, and he alleged that a further sum of £21 10s. would be required to complete the work according to the specifications.

He admitted the arrest, which he said was malicious and without reasonable and probable cause.

And he prayed that the plaintiff's claim might be dismissed with costs.

The defendant claimed in reconvention:

(*a*) The sum of £30 2s. 8d.

(*b*) £500 damages for malicious arrest.

(*c*) Alternative relief with costs.

Mr. Juta, Q.C., and Mr. Molteno appeared for the plaintiff.

Mr. Searle, Q.C., and Mr. McLachlan for the defendant.

Thomas Watson deposed that he was a builder, residing at Claremont. The main contract with the defendant was begun on the 18th March, 1893. Had done certain work before, which represented the item of £9 in the plea, but this had nothing to do with the contract. This £9 worth of work was done in February, 1893. About the middle of February he stated a price for the work, £250. Haupt said he must go to see Mr. Steytler about the money. About a month afterwards Haupt told him that the money was all right, but he wanted the quantity of work reduced. Witness then gave in his price at £165. There was no written contract. Haupt had a specification written out, and went round the house with witness. Witness jotted down notes and formed an estimate, but Haupt kept the plans and specifications. Certain ceilings were to be done exactly the same as those in witness's house. The work was finished about the end of May, 1893. Haupt never complained at any time, but paid him various sums. The £9 item was not to be included in the contract price of £165. Never

spoke about such a thing. Haupt himself was building outhouses before witness worked for him. Before witness commenced his contract, Haupt had done work on another part of the house. Since witness finished Haupt had made other additions to his house.

Mr. Justice Upington: What was the amount due at the time of the arrest?

Mr. Juta: £48, but there was another writ of arrest issued on the same day for £60, at the instance of defendant's butcher.

Mr. Searle: That has nothing to do with this case.

Mr. Juta: But you say the arrest was malicious.

Witness (continuing) said that he did not keep a copy of the specification, but the copy submitted to the Court by the defendant was substantially correct. Haupt had paid him £120, in four instalments. He had often asked him for money. Defendant said that he had to see Dr. Smuts, who would give him £100, he being agent for Dr. Smuts at the General Election. Defendant saw Dr. Smuts, and afterwards wrote witness a cheque for £5. Witness said, "What is this for, Haupt?" Haupt replied that that was all he could get out of Smuts. That was in August. On the 31st October he had Haupt arrested. He heard from Mr. Dudley, manager of Sturk & Co. that he was going away. He also heard that Haupt was head over ears in debt. He saw Tregidga, defendant's butcher. He knew that Tregidga was having Haupt arrested that morning. Witness saw Haupt, and told him he heard he was going to England. Haupt said he would have to wait till he came back, and became abusive. Witness saw Steytler, who told him that Haupt had submitted to him a list of creditors. Witness accordingly went down to the ship with the writ. He found Haupt on board with a lady. Haupt was keeping a woman (Haupt had told him so himself) as his wife almost opposite his (Haupt's) own house. Witness told him if he could afford to keep a woman he could afford to pay his account. Saw the woman Haupt was living with on board the boat with him.

(Defendant's return ticket from England was produced in court.)

Mr. Justice Buchanan: Did the name of Mrs. Haupt appear on the list of passengers?

Witness: No.

Mr. Juta said it was not his wish to bring forward such evidence, but the defendant insisted on pressing his claim for malicious arrest.

Cross-examined by Mr. Searle: Never saw Mr. Fock at the house.

Witness was not a drunkard, and he had only once been seen the worse for drink during the present year. He was not the worse for drink at any time during the time he was working for the defendant. The work was principally done by his employes, but witness himself did a good deal of work. Witness sublet the whole of the carpenter's work to Cox. All the work, according to contract, was finished in June, and witness was then entitled to his money. It was arranged that Haupt should pay him as the work progressed. Haupt never complained that witness would not finish the work. Witness never had an accident, and was never laid up in bed, and never had to engage a doctor. Haupt never asked witness to put up certain barge boards. Witness did not put them up, as Haupt did not keep up his instalments as the work went on. When Haupt paid him small amounts it was not stipulated that the work was to be finished. Haupt never mentioned to him that he had certain claims against him. Witness only knew two days before the arrest that Haupt was leaving. Never spoke to Fock about it a month before. Haupt never mentioned to him, in the presence of Fock, or at all, that there were to be no extras. Haupt showed him plans, and witness said, "You are surely not going to show a plan like that to the Council." Haupt replied that he was a member of the Council, and it would be all right. Haupt told him his income was £600.

Re-examined by Mr. Juta: Plans had to be lodged with the Council and were retained by the Council. Mr. Steytler told witness that Haupt went to him and said that witness's contract was £350. Steytler said he paid him £350 against the contract, and that he (Steytler) thought witness had been paid long ago. Witness's contract was only for £165.

Eliza Jane Watson, wife of the plaintiff, corroborated the last witness as to the ceilings. Her husband had never been laid up. Her husband was not a man who took too much liquor.

Cross-examined by Mr. Searle: He may have been a little the worse for drink on one occasion. He only took an occasional glass.

Mr. George William Steytler, secretary of the Colonial Orphan Chamber, said he was administering an estate from which Haupt received an income. Watson came to witness on the 31st October and asked about Haupt's position. Witness replied that Haupt had made arrangements by which witness was to pay off his creditors. That would be done. In February, 1898, Haupt received £350 from witness, as he said that would be about the amount of the contract. Watson's name was not on the list of

creditors supplied to witness by Haupt. The list amounted to over £400, but Haupt owed succession duty besides.

Isaacs was examined on the question of the disputed ownership of certain bricks used in the work.

John Clews was examined as to the value of the boards used. He considered the charges reasonable.

Pierre François Haupt, the defendant, said he was a member of the Claremont Municipal Council. Mr. Fock was present when he and plaintiff agreed that the work should be done for £150. Witness never promised to pay Watson anything whatever for extras over and above the £150. Witness gave him a cheque for £50 to get material, and the verbal agreement was that £50 should be paid when the work was half finished, and the remaining £50 on completion. Witness had not paid in this way because Watson had given him a tremendous amount of trouble about the work. He had no intention of not returning from England. He took out a return ticket (produced). On the day he was to have left by the boat his bank balance was £90. Witness was possessed of landed property at Claremont and elsewhere. It was not heavily mortgaged. Tregidga's account had not been delivered to him; he did not know it was due. Had a tender from Harrison pointing out exactly what Watson still had to do to fulfil his contract. It was for £21 10s. Witness was leaving for England on very important business when he was arrested. He intended returning on the 20th December.

Cross-examined by Mr. Juta: Watson's writ was the one he was arrested on. He paid Tregidga the next morning. It was for meat supplied some time in 1893 and 1894. Tregidga gave him unlimited credit. The ceilings were not like Watson's. Never got a cent from Dr. Smuts over the election business. Did not get a cent from Smuts, but he got cheques to pay other people with. The cheques were made payable to witness. Witness got the proceeds. Just before he left for England he raised money on the security of his property. Watson came to him on the morning of his leaving, and although Watson owed him money at the time witness said if he would put up the barge boards his wife would square up. That was only a dodge to get him to put up the barge boards.

Joseph Fock, marketmaster at Claremont, said that he was present when £150 was agreed upon between the plaintiff and defendant. Several times saw Watson, and had a conversation about Haupt going away. Watson knew two months before he was going away. It was common talk in the village that he was going away.

Cross-examined by Mr. Juta: Did not see the plan (produced) when they were together, and the £150 was agreed upon.

Mr. H. W. Cox said that on two occasions the work was delayed by the plaintiff not having the materials necessary.

William Arnold Harrison, carpenter, said he had put in a tender for work remaining to be done of £21 10s.

Cross-examined by Mr. Juta: There was a difference between the barge boards he had tendered for and those of the pattern produced. Did think that it could not possibly be done under £10.

Mahomet Abdol Rakiem, carpenter, said the work was stopped twice owing to there being no ceiling-boards, he got same from Haupt. Plaintiff very seldom did any of the work himself.

Mr. Juta was proceeding to address the Court, when the Chief Justice suggested that if he would agree to accept £25, they might hear Mr. Searle on the question of the claim in reconvention.

Mr. Searle addressed the Court on the merits of the case, and on the claim,

By direction of the Chief Justice, the plaintiff was again put into the box.

He said he had heard Fock's evidence that he was present at Haupt's house, and that the price was fixed at £150. He emphatically reiterated his statement that he never saw Fock at Haupt's place at all, and that the price was £165.

Mr. Fock was also again put into the box, and said he was not related to the defendant, but was a good friend of his, and also of Watson. Watson had seen witness several times at Haupt's place. On one occasion Watson was chastising a boy there when he (witness) was present.

Judgment was given for the plaintiff for £25 with costs, and also in his favour on the claim in reconvention.

The Chief Justice said: The question between the parties now hinges upon what the real contract price was. According to the defendant it was £150, and according to the plaintiff it was £165. Well, in my opinion, it was £165 as stated by the plaintiff. Mr. Fock says he was present when £150 was mentioned, but I think Mr. Fock was mistaken, and must have misunderstood the purport of the conversation; I do not wish to say more than that; but I think the whole conduct of the defendant himself shows, in the negotiations with the plaintiff, that he himself believed that the contract was £165,

Well, £140 has been paid, and therefore there would remain still owing to the plaintiff the sum of £25. The plaintiff also puts in a claim for several pieces of work which he did since the date of the contract. Well, I quite believe that the plaintiff thought that this additional work was to be paid for, and that he told the defendant so. It is quite possible also that the defendant may have misunderstood what was stated, and I think the plaintiff has himself to blame for losing payment of this additional work, because if he had in a business-like manner kept proper books and supplied proper accounts to the defendant the mistake would never have occurred. He himself is to blame for now being deprived of payment of the sums for the additional work done subsequently to the date of the contract; but the sum of £9 for work done before the contract he is clearly entitled to. But as the sum of £9 would be a fair value to place upon the barge boards which he had failed to put up, these two sums balance, and, therefore, there would be still £25 due to the plaintiff. The only difficulty I have experienced in this case is this, whether the plaintiff could recover at all without proving that he had done the whole of the work. That is the defence urged by Mr. Searle, but that defence is met in the evidence given by the plaintiff, which is to the effect that it was arranged between him and the defendant that the work was to be paid for as it progressed. Well, certainly, the full amount of work for the £25 had been done at the time of the arrest. There is £9 to be accounted for, but against that there was the £9 already earned; therefore there was still the £25 already earned; and if there was this agreement, which I have no doubt there was, that the money should be paid as the work progressed, then the full sum of £25 was due before the arrest took place. For this amount therefore judgment must be given for the plaintiff. Then come, the question of the malicious arrest. Well there can be no malicious arrest unless the defendant committed the act maliciously and without probable cause. I fail to see that in this case there was either malice or want of probable cause. It is proved now that the sum of £25 was owing to the plaintiff; therefore there was reasonable cause for the arrest. It is said, however, that he had no reason to believe that the defendant was leaving the Cape for good. Well, he was not the only man who arrested the defendant. On the same day a tradesman arrested him for his butcher's bill. This mere circumstance tends to justify the plaintiff in arresting him, and he must have had good reason to believe that the defendant did not intend to return. I am not prepared to say, nor do I say, that the defendant did not intend to return, for I think it has been satisfactorily proved that he intended to return to the Colony, but the question is, was the plaintiff reasonably justified in believing that by not effecting the arrest he would lose his money, and as I am of opinion that he was so justified, judgment must be for the plaintiff for £25 with costs; judgment will also be given in his favour on the claim in reconvention.

[Plaintiff's Attorneys, Messrs. Findlay & Tait; Defendant's Attorneys, Messrs. Du Preez & Walker.]

LIQUIDATORS CAPE OF GOOD HOPE BANK V. DE BEERS CONSOLIDATED MINES AND DUNKELSBUHLER AND CO.

Mr. Sheil mentioned this case, which is set down for the last day of term, and asked the Court to fix a special day out of term for the hearing. He suggested the 14th December if that day were convenient for the Court.

Mr. Rose-Innes, Q.C., for De Beers, and Mr. Solomon, Q.C., for Dunkelsbuhler & Co., consented.

The Court fixed the 14th December next for the trial.

STRACHAN V. COLONIAL GOVERNMENT. { 1894. Nov. 26th, „ 27th, „ 28th Dec. 3rd.

Crown liability—Stipulation in favour of third person—Treaty—Griqualand East—Adam Kok—*Bona-fide* title to land.

In 1862 Adam Kok was allowed by the British Government to settle with his tribe of Griquas in the territory known as Nomansland, one condition being that they should occupy the country as British subjects. They were, however, allowed to conduct the internal administration of the country without interference until the year 1874, when the Government of the Cape Colony intimated to the Chief and his tribe that the time was approaching when the direct rule of the Cape Government would be established over the country.

In reply, the Chief expressed his desire that the Government should take the initiative and that the country should not be annexed to Natal,

After some negotiation a final agreement for the annexation and rule of the country was made, stipulating, inter alia, *that all* bona-fide *and undisputed titles to land already issued should be confirmed by the Government, and by Act 38 of 1877, the country was annexed.*

Held, *in an action brought by three grantees, that, after accepting the benefit of the stipulations made on their behalf, they were entitled to recover damages from the Government for breach of its promise to confirm their titles, provided that the titles were* bona fide *and undisputed.*

The Court not being satisfied that the titles issued to the plaintiffs were bona fide, *and considering the delay in enforcing their claim and the fact that three Commissioners, two of whom were now dead, had decided adversely to the claim, granted absolution from the instance.*

This was a consolidated action brought by three sons of Donald Strachan, of Umzimkulu, against the Hon. John Frost, in his capacity as Secretary for Agriculture, and as such representing the Colonial Government, for a declaration of rights with reference to three farms situate in Griqualand East and granted to the plaintiffs by Captain Adam Kok, late Chief of the Griquas.

The declaration alleged that in or about June 16, 1874, one Adam Kok, the chief or head of the Griqua nation residing in the territory known as Nomansland between the Bashee and Umzimkulu Rivers (now portion of East Griqualand), made a grant in due and proper form to the plaintiff of a certain farm called Bulfontein, situate in the said territory, and more fully described in the said grant; and a title deed to the said farm was duly issued in accordance with the laws and customs of the said nation. A translation of the said title deed, which is in the Dutch language, is hereunto annexed, and the plaintiff craves leave to refer thereto.

Thereafter, in or about August, 1879, the said territory was, with the consent of the said nation duly signified prior thereto, formally taken over and annexed to this colony, of which it now forms part, under and by virtue of Act 38 of 1877.

The Colonial Government upon the said annexation became bound by the said grant, and the plaintiff became entitled to demand from the said Government a recognition thereof and the issue of a title to the said farm and diagram therewith, in accordance with the laws of the Cape Colony.

It was also stipulated and expressed as one of the conditions upon which the annexation of the said territory was arranged and agreed to between the Colonial Government and the Griqua nation that all *bona-fide* and undisputed titles to land already issued would be confirmed by the Colonial Government. The grant to the plaintiff was *bona fide* and undisputed.

The Colonial Government refused and still refuses to recognise or confirm the said grant, or to give plaintiff possession of the said farm, the value of which is £1,000 sterling.

By reason of the wrongful refusal above referred to, the plaintiff has been deprived of the use and possession of the said farm, and has sustained damage in the sum of £300 sterling.

Wherefore the plaintiff claims:

(*a*) An order declaring that he is entitled to have the grant of the farm Bulfontein confirmed, and directing the defendant to take the necessary steps to cause a title and diagram to be issued to him in accordance with law.

(*b*) A decree ordering defendant to deliver up possession of the said farm to the plaintiff.

Or, as an alternative to (*a*) and (*b*), payment of the sum of £1,000, the value of the said farm.

(*c*) Payment of the sum of £300 sterling as and for damages sustained as aforesaid.

(*d*) Such alternate relief as may seem meet.

(*e*) Costs of suit.

The defendant, after admitting the formal allegations in the declaration, pleaded that in or about June, 1874, or later in that year, Adam Kok purported to make a grant to the plaintiff, a European and not a Griqua, and then a child of four years old, in terms of the document annexed to the declaration, but he denied that it was a *bona-fide* and undisputed grant, or that it was made in due and proper form, or that it was made with the consent of Adam Kok's Council, or that a title deed to the land was duly issued, or that Adam Kok or his Council had any right to alienate any land belonging to the Griqua people to Europeans, or to the plaintiff, or that Adam Kok had any right to issue any title to land. The defendant further said that the alleged grant of land was never surveyed, or in any way marked by metes or bounds, that no diagram was ever framed or annexed to the alleged grant as stated therein, that the sum of £2 was never paid to the Resident Magistrate, and that no beacons were ever erected.

He admitted the annexation in 1879, denied that on such annexation the Government

became bound by the grant, and said that in accordance with the terms upon which the annexation of the said counntry took place a Commission to inquire *inter alia* into the validity and *bona fides* of the said alleged grant to the plaintiff, who was represented by his father and natural guardian, was appointed by the Government of this colony, which Commission reported that the said grant should not be confirmed, and thereupon the Government refused to confirm the said grant, and the land in the said district was alienated to others or set apart for native locations.

The plaintiff's father and natural guardian was fully aware of the said facts, and the said land has been used and occupied by the Government, or those holding under it, uninterruptedly, openly, and as of right ever since 1874, until August, 1892, when the plaintiff's father claimed the said grant on behalf of the plaintiff by way of petition to the Parliament of this colony, and the said Parliament refused to admit the said claim.

The defendant admitted that he refused to recognise the plaintiff's claim, but he denied that the value of the grant was £1,000.

He denied that the plaintiff had been deprived of the use and possession of the farm, and that he had sustained damage in the sum of £300.

The defendant finally said that it would be contrary to the law of the Colony to issue a title or diagram to the grant in question, and he prayed that the plaintiff's claim might be dismissed with costs.

The replication joined issue.

The following is a translation of the deed of grant in favour of one of the plaintiffs:

I, Adam Kok, Chief of the Griqua Nation with consent of my Council, hereby grant to Robert Scott Strachan, as his lawful property, a piece of ground in extent about three thousand acres called Wacht een Beetjes Hoek, situate in the district of Umzimkulu, as will more fully appear from the annexed diagram, on condition that it shall at all times remain in the power of the Griqua Government to define and make roads and outspan places within the said piece of ground, and that the said Robert Scott Strachan shall pay an annual tax of £2, payable to the Resident Magistrate of the district, and that the owner of the said piece of ground shall be bound and obliged to erect proper beacons on the boundaries of his farm, and subject to such laws and regulations as have already been and may hereafter be made and established for the holding of such farm.

Given under my hand and the Public Seal at New Griqualand, Kokstad, on this the 16th day of May, 1874.

ADAM KOK,
Captain.

By command of the Chief,
J. BERGOVER,
G. C. BRISLEY,
Government Secretary.

Mr. Searle, Q.C., and Mr. Sheil appeared for the plaintiffs.

The Attorney-General and Mr. Giddy for the Government.

Mr. Donald Strachan, plaintiffs' father, deposed that he resided in Griqualand East. He was father of the plaintiffs. They were twenty, twenty-two, and twenty-four years of age respectively. Witness was born in Scotland in 1842, and came out to Durban in 1850. In 1859 he and his brother Thomas went to Nomansland, and settled there. He lived there, ever since. He knew Adam Kok. Witness and his brother got a farm each from the native chief Teba. Kok settled in the country where Kokstad is now in 1863. Witness's farm was named Clydesdale. The grant of that farm was confirmed by Adam Kok. Witness took service under Adam Kok. He was called a field-cornet, but he really had to manage natives. The natives belonged to different tribes. Subsequently, he became Magistrate and General Superintendent of Natives. These natives lived under their ordinary tribal tenure. When Kok came he established a form of government based on the Colonial system. Received his title to Clydesdale from Kok verbally. This stood for years, until in 1867, when he received title. (Title-deed book handed in.) This was confirmed afterwards by the Colonial Government. He acted as Superintendent of Natives up to the time the country was taken over. Kok was practically an independent chief; he declared war, sentenced men to death, and made treaties with Natal, &c. Kok had a Raad, but it only assembled about once a year. It was an elected Raad. From time to time white men came into the country and received grants of land. He was a burgher of the Griqua State, and his name appeared as such in the title deeds. Kok referred almost every white man to witness as they came into the country, to be examined as to character, &c. As Magistrate witness was supposed to get about £200 a year, but there was no cash in the country, everything was paid in kind. In 1874 witness ceased his connection with the firm of Strachan & Co. He was at that time appointed Acting Chief Magistrate by the

Colonial Government. In 1869 he received from Kok a farm in part payment of arrears of salary—the farm Schi nper's Nek. In 1872 he gave up Clydesdale to the Church of England, and received Balule in lieu of it. Balule was 1,500 acres smaller. In exchange for two farms he bought from Griquas and surrendered to Adam Kok he received two other farms from Kok. They were not grants, they were purchases. The only other farm he was granted was the farm Politiek. That grant was rejected by the Commission, but subsequently he received part of it from the Land Board which succeeded the Commission. He had not taken out the title to that farm. There were no surveyors in the country, but Barker, who was not a surveyor, used fo do such work. His work was never confirmed by the Griqua Government. Witness did not employ Barker, not considering him competent. The boundaries of the farms were mostly based on the natural conformation of the farm. It was at one time agreed that Kok should cede some territory on the Natal border to Natal. This cut through the middle of his farm Clydesdale. The conditions arranged by Sir Philip Wodehouse with Adam Kok were that the grants issued by the latter should be confirmed. The three grants in the present case to his sons were sent to him by Adam Kok for his services, more especially for his services in connection with the Pondo matter. There had been much raiding, and in 1872 the Government held Adam Kok responsible. There were hundreds of natives on the border indulging in raids. Subsequently it was fixed that 500 head of cattle should be paid by Kok to the Pondos as compensation. Kok had sent some of his councillors to Pondoland, and finally sent witness. Kok was very poor, and there would be a difficulty in getting the 500 cattle. Witness went on the mission to the Pondos, and succeeded in getting the remission of the compensation, and also that the expenses should not be borne by Kok. For his services he received a great demonstration at Kokstad on his return, guns firing, &c. He received no remuneration from Kok, who, however, told him he would not forget him. He was one of Kok's commandants. He received nothing from Kok for his services in the field, but received three guineas a day from the Colonial Government. Kok said he would give him something. In 1869 Kok made war with the Bacas, and witness took possession, with others, of vacant ground (these three farms), and ran his stock on them up to 1880. In 1874 he received titles from Kok to these three farms, Bulfontein, Dumaze, and Wacht en Beetje Hoek. Witness paid quitrent, according to custom, once to Adam Kok, but in the following year the British Resident would not accept quitrent. (Position of the farms was here pointed out on map produced.) Dirk Swart, one of Kok's field-cornets, went with witness to point out the boundaries of the farms. The location of the farm Bulfontein was well known and the other farms adjoined. It was the custom for field-cornets to point out boundaries, but subsequently when the Government surveyors came into the country they had to be verified. Witness at that time was the authority on the farm boundaries. When Mr. Cumming was appointed British Resident, witness's quitrent on the farms was tendered to him. That was after the Commission sat. Shortly after he got the titles he met Kok, who told him they were for his services. Witness appeared before the Commission and handed in his titles. He just handed them in ; there was no objection raised to the titles at the Commission. Had no reason to believe that grants issued by Kok would have been questioned. People had hundreds of little bits of paper and verbal promises from Adam Kok, and a great number of these mere verbal promises were confirmed by the Commission. The value of these three farms in 1874 would be £75 or £100 each. The present value of them would be more than £1,000. The right to a farm carried with it the right to an erf. Kok gave three grants of erven to his sons at the same time. These grants were confirmed. In 1874 he was made J.P. under the Imperial Act, and subsequently became a magistrate under the Colonial Government.

Cross-examined by the Attorney-General: A portion of the farm Politiek (grant No. 323) was confirmed to him by Government—but only about half of it. but nothing was said about the three titles in question. It came to him as a surprise that Kok made the grants in the children's name. He expected more than the farm Politiek for his services, as the satisfaction with the result of his Pondo mission was great. He was continually employed in different directions by Kok. Nothing was given to him as specific reward for his Pondo mission.

Mr. Schreiner produced the minute-book, showing that on the 8th May the Raad voted D. Strachan the sum of £8 for work Pondo Commission.

Witness could not say what this sum of £8 was for. It could not have been for his services in Pondoland. Mr. Brisley must have given the plaintiffs' names to Adam Kok. Brisley was living with Kok at the time. Brisley and witness strenuously fought at

the time of the annexation that all titles issued by Kok should be recognised. As far back as May, 1872, Kok received from the Government notice that it was intended to exercise control over Nomansland. In 1869 the country was offered to Sir Philip Wodehouse and refused, and the annexation in 1874 came on them as a surprise. On the 24th June, 1874, a meeting was held in Kokstad, eight days after the date of the title. All of them were not well aware then that Kok's power was on its last legs. When the Commission left in 1872, they gave no intimation that the country would be annexed.

Mr. Justice Buchanan: When did Kok's power cease?

The Attorney-General: Well, only in 1879 actually, but he would argue that the Colonial Government was not bound to ratify any grant by Kok to a white man.

Cross-examination continued: Nothing was asked at the Commission about these three farms—not a word. It did not strike him as ridiculous that Adam Kok should make grants on that day to so many children of his councillors and advisers, &c. Witness was not in Kokstad at the time. Sometimes, in special circumstances, Kok's Council confirmed titles. As a matter of legal right, his sons got a title from Adam Kok. He received the paper and the land. He had from time to time advanced his legal claim to the farms, but was put off. In 1891, on Mr. Watermeyer's advice, he petitioned the Colonial Parliament. In 1875 the grants were rejected by the Commission. He thought, however, the grants would subsequently be allowed, the same as Mr. Brisley's, and he had often tried to get them allowed before he went to Parliament. He was always put off with promises. He persistently advanced his claims, and was always told to "wait a bit." He felt positive that Government would confirm the grants. Had always regarded it as a legal right. Could not say what the £8 mentioned in the minutes was for, but it was not for his important mission to the Pondos. Mr. Watermeyer recommended him to petition Parliament. Was not asked at the Commission about his views regarding the three farms, nor about the farm Politiek. The majority of Kok's grants were to counsellors, &c., or their children. As far as witness was concerned, these grants were not given in any "final scramble," nor was he aware of any final scramble. Adam Kok was not an old man in 1874. He died in 1875 from the result of an accident.

The Chief Justice: It was only human nature that they should get everything they could out of Adam Kok so long as it was legal. The only question before the Court was whether it was legal. Plaintiff now stood upon his legal rights. Could Mr. Strachan get his title from Adam Kok? Was the grant *ultra vires* or not? What was the constitution of the country, and what power had Adam Kok?

The Attorney-General: And were the grants *bona-fide*?

Re-examined by Mr. Searle: Grants to strangers came sometimes before the Raad, but not grants to burghers. Grants to Griquas were made by Adam Kok, and witnessed by two members of his Council, or two others.

By the Court: The grants were made to witness's sons as burghers. Never had any communication with anybody before these grants to his children. Had been so mixed up with the Government since that time that he always felt rather diffident about pressing his claim and thought the matter would be settled without going to law.

Mr. Geo. Chas. Brisley, living in East Griqualand, deposed that he had resided there for about thirty-one years. Up to 1867 he traded there. He lived at Mount Currie about 1865, Adam Kok's place. In March, 1867, he became secretary to Adam Kok. Kok and Jackson (witness's predecessor) had been to Cape Town, and they brought back a lot of titles, and forms, and books. Witness entered the Colonial Government service in 1874, the day after the annexation. Kok was practically an independent chief. There was a Council, and an Executive Council. Kok issued grants always.

The Attorney-General objected to any oral evidence on the point of Kok's power, when there was documentary evidence on the subject.

Mr. Justice Upington: Do you mean to say that Kok had the power of his own motion to give grants of land to Europeans?

Witness: Certainly, at all dates and at all times. In the case of burghers Kok's grants were not confirmed by his Council. Sometimes his grants to strangers were so confirmed. Witness was a member of both Raads and had the books in his possession. Nobody could make grants really but Kok. Kok was very particular about the title deeds. Witness kept the minutes of the Executive Council, but not of the Raad. Was aware of Sir George Grey's memoranda of 1860. The conditions contained in that memo. were never carried out. Letters were written by Adam Kok as to his position, dated 25th January, 1869, 28th October, 1875, and 22nd December, 1875, to the Government. In 1866 witness saw Sir Philip Wodehouse at Aliwal North by Kok's directions. He discussed the matter mentioned in the first letter. Regarding

titles, in 1867 there was a summary of some correspondence between Kok and his Volksraad. These were instructions in regard to farms. Forty-two titles were issued by his predecessor. In 1870 there was a meeting of the two Raads, when a minute was passed that the Captain (Kok) had the right to grant farms. Coming to the issue of these particular grants in dispute. Kok told witness to make out certain titles, and among the list were the names of Mr. Strachan and his three children. These grants were made out in the ordinary manner. There was nothing irregular in any way about the issue of these particular titles. They were issued, Kok told witness, for Strachan's children because Strachan had done a lot of work without recompense. Kok said he had no other means of showing his appreciation of Strachan's service. A fee—10s. for each title—had to be paid, and that was paid, also the quitrent of £2. Witness got a farm himself about that time. Government confirmed the title in 1892. Witness's farm was on the same list given by Kok as Strachan's. There was no particular scramble for farms, because the 1872 Commission did not tell Adam Kok that his country was to be taken over. Strachan was a burgher. Transfers were made out to Strachan accordingly. A number of Europeans were recognised as burghers. If strangers were approved of they would be considered burghers. The value of these particular farms was in 1874 about £100 each. Witness had let his own farm, of which he got the title in 1892 at £100 a year. The High Commissioner never actually interfered with the internal affairs, but frequently gave advice. In 1869 Kok suggested he should be taken over. Sir Philip Wodehouse declined to take the country over. Mr. Strachan made a most advantageous settlement with the Pondos, and this was a most valuable service to Adam Kok. He was received on his return with a great demonstration. He had saved the payment of about 500 head of cattle, &c. The £8 mentioned in the Raad minutes as given to Strachan was simply only a petty detail. It would be utter nonsense to suggest it was for the mission itself. These farms in dispute would be worth fully £1,000 each. Grants of erven were usually made to burghers having grants of farms. Grants of erven were made to Strachan and his three sons. Numbers of farms disallowed by the Commission were afterwards allowed by the Government. Farms were granted to Mr. Read's minor children, who were never in the country, and afterwards confirmed by the Government. They were issued for services rendered by their father to Adam Kok. These were confirmed by the Government. Adam Kok had distinctly the power to make grants of land of his own motion.

Cross-examined by the Attorney-General: Before the particular time of Strachan's Pondo Commission Strachan was sent at various times to the Pondos. In 1874 Kok instructed witness to make out the grants. On the 27th June, 1874, Mr. Orpen met Adam Kok at Kokstad. Witness was present. The published record of that meeting he (witness) did not agree with. In this record Kok is made to say that in 1872 he understood the country was to be taken over, but witness was present in 1872, and Kok was not made to understand so. The record only stated Mr. Orpen's private opinion. Witness had read the report of the 1874 meeting in the Blue-book. He differed from the record that it was said that Kok's grants would be not confirmed. It was said that the grants were to be inquired into. Witness wrote in 1875 that Adam Kok's titles were *bona fide*, and that they were not to be disturbed. Witness reiterated that the conditions of Sir George Grey of 1860, as far as he was aware, were not acted upon. Was aware that Adam Kok wrote a letter in 1861 acknowledging the condition, but witness went into the country in 1864, and became secretary to Kok in 1867, and Kok always told him that the conditions had dropped. These farms were not beaconed. The Council never had the question before them of confirming or otherwise grants made by Adam Kok. These three farms were for all Strachan's past services. Strachan and his children were deemed to be Griquas. A man would become a Griqua by giving services.

Re-examined: No diagrams were issued. The field-cornet pointed out roughly the boundaries of the farms. One Williamson was a stranger. A minute stated that outsiders who wished to become Griqua subjects must apply to the Council for grants. But it depended on Kok himself. Outsiders were simply sent to the Raad first, and if they passed, Kok might give them a grant. The provisions of Sir George Grey of 1860 were never regarded. Witness himself had passed sentence of death on persons, and did other things which under those conditions the High Commissioner was to do.

By the Court: Adam Kok had the power to grant a title whether the grantee was a stranger or a Griqua, as he thought fit. Kok could make a present of a farm just as he liked. Of course, Kok exercised that power in such a way as not to aggrieve anybody. As a matter of fact, Kok never sold an inch of land, nor had he made presents, except in one or two cases.

John Bergover, Griqua, deposed that he was seventy-seven years of age. Born in old Griqualand; was first of all under Adam Kok's father, and trekked with young Adam Kok to Nomansland. Kok gave him a grant of land. Witness was one of the Executive Council, and in his capacity as such signed a number of grants as a witness. Captain Kok gave out the land. He had the power alone of disposing of the ground. A number of white men got grants. These white men were all burghers. Was present at the meeting of the Raads in 1870, where a resolution was pas ed that the Captain had the right to give the land. Witness was the treasurer of the Executive. Mr. Strachan went to Pondoland, and on his return Captain Kok proposed to the Executive to give farms to Mr. Strachan's children. The Council made a resolution to carry that out. Strachan rendered great services to the Griquas.

Cross-examined by the Attorney-General: The proposal to give Strachan's children was agreed to between Kok and the Executive. Witness had no son. The Isaac Bergover to whom a grant was given on the day of the grants, 16th June, 1874, was his nephew. Many grants were signed by witness.

By Mr. Justice Upington: The grants of land had not been the subject of dispute or fighting since that time.

By the Chief Justice: On the day all those grants were made, Captain Kok thought the day had arrived when he should reward his faithful followers.

The Chief Justice said that was *bona fide* enough. It was a reward to faithful followers when the country was about to be given over.

Ludwyk Joseph Kok, a Griqua, said he came to Nomansland with Adam Kok. Was a relative of Adam Kok. Witness received grants of land. The Griquas were well pleased with what Mr. Strachan did in the Pondo dispute. Eight or ten white men received grants of land. These were men who recognised Adam Kok as the Chief.

Guy White, law agent, practising at Griqualand East, said he had prepared the list (produced) of titles not recommended by the Commission, but which were subsequently confirmed by the Government. The value of the farms in dispute would be worth roughly about 7s. 6d. an acre.

Charles Duncan Griffith, Colonel, deposed that in 1872 and 1875 he sat on Commissions. In 1872 to assist in defining the boundaries between Pondoland and Nomansland, and in other matters in connection with stock thefts, &c. In 1875 the present claims came before his Commission. He drew a distinction between claims before 1872 and after 1872. To the latter the Commission had to give particular attention. Witness was the only survivor of the Commissioners. He was chairman of both. Had seen the official record of the so-called titles. There were notes on them which represented the decision of the Commission at that time. [Notes written on titles in title-book that the Commission did not recommend confirmation of the titles.] It was because the grants were alleged to have been made to children of such tender years, and also that a grant of 12,000 acres was made to their father on the same date, that the Commission did not regard the claims as *bona fide*, and also because no mention was made of these grants in the minutes of the Executive Council.

By the Court: The Commission recommended some of the grants, although they had not been confirmed by the Raad. The minutes of the Commission would show. The only test was were the titles *bona fide*.

Examination continued: The Commission had constant deputations before them from Griquas complaining of the unjust way in which Adam Kok had given out land. It was reported to the Commission that there was no reference whatever made to Kok's Raad on the subject of the grants issued on 16th June, 1874. Some grants, however, approved by the Raad were still not recommended by the Commission. No claims were advanced at the Commission. There was no allusion to the fact that the titles were given to Strachan's children on account of Strachan's services. Could not remember, however, whether Str s represented or not at the Commission. They did not call upon Strachan for an explanation. No one disputed these grants to Strachan's children. Witness was never referred to again on the subject of Strachan's services.

By the Court: With the exception of the native locations, Kok could have allotted all the land on the 16th June. He allotted about 350 farms out of 1,500. He did not allot all he could; only that portion. Of the 350 granted, roughly speaking, only a small number were unconfirmed.

By the Attorney-General: Did not profess any special knowledge of Griqua law.

Cross-examined by Mr. Searle: One reason for not recommending the grants in question was that Strachan had received other grants, but nevertheless, the Commission recommended grants to others who had had previous grants. The Commission recommended some titles founded on grants to minors by Adam Kok. The Commission went back before 1872 in investigating Kok's grants. After he (witness)

sent in his report he was never referred to again by the Government about the matter. Did not know even how the recommendations or non-recommendations resulted. Recommended some grants because the Captain (Kok) said the claimants were entitled to them. The Commission's instructions were not merely confined to titles to Griquas.

By Mr. Justice Upington: If Adam Kok said Strachan's and his sons' grants were for services the Commission would have approved of them if they were *bona fide*.

Examination continued: The main object of the Commission of 1872 was to settle disputes between all the tribes and to fix boundaries.

By the Court: The Commission was in communication with Adam Kok at the time the Commission sat in Kokstad. Knew that Strachan did render good services to Adam Kok's people. Heard also that Strachan led a commando. Supposing he had known that these farms to the children were for the father's services, he would not have recommended them. His great objection was that the grants were made to Strachan's children and not to himself. There was a grant to Strachan himself on the same day, and the Commission on the face of it thought the grants were *mala fide*. The Commission could have had access to Adam Kok at the time of its sitting.

Mr. Horne, Surveyor-General, said that since about 1880 these disputed farms had been surveyed as a native location. The whole matter from the first had been dealt with as Crown land since 1877, after Mr. Watermeyer's report. The titles subsequently recognised were confirmed, because Kok in the first instance had granted them.

By the Court: The last titles issued were between 1890 and 1892.

Cross-examined by Mr. Searle: On the 11th April, 1891, witness made a report that Strachan's claim should be settled. He then suggested that three other farms (those actually granted to Strachan not being available) should be given to him instead. From time to time, upon representations of the Land Board, titles were issued for grants, some of which were not recommended by the Commission.

By the Attorney-General: His recommendation that these farms should be given was not adopted.

By the Court: The value of these farms when Adam Kok made the grant would hardly pay surveying expenses. The present value he thought would be about £375 each. He thought too much was being paid for Griqualand farms. Prices at a sale, however, sometimes very much exceeded the estimated value. He was only speaking of unoccupied Crown lands.

This closed the evidence for the Government.

Mr. Donald Strachan was recalled and again examined, and in answer to the Chief Justice, said that he first took occupation of the farms in 1869. He had occupation of them, therefore, for years before Adam Kok granted the farms to his children in 1874. Kok was well aware of his having been in possession. He remained in possession of the farms from 1869 till 1880, when the locations were laid out, and Mr. Brownlee then told him that if his claims were allowed by Government, he might have ground in another part of the country. He protested to Mr. Brownlee at the farms being made a location. The whole of the three farms were now a native location. He was a partner with Brisley on the 16th June, 1874. Witness always had an idea that Kok would give him the farms. He had never spoken to Brisley about them. Brisley he did not think worked the getting of the farms. Adam Kok gave them of his own accord. Witness knew the country would probably be taken over. He had been urging Kok to get himself taken over, and he advised him to go to Sir Philip Wodehouse in 1869.

Mr. Searle, Q.C., was heard on the question of the *bona fides* of the grants.

The Attorney-General for the Government contended that the Court had no jurisdiction as under the final agreement entered into between the Government and Adam Kok the former was the dictator of terms, and no legal obligation which could be enforced in the Supreme Court had been imposed upon the Government.

On the question of *bona fides* he urged that it would require something very strong to induce the Court to set aside the decision of the Commissioners. The circumstances attending the giving of the grants were most suspicious. Brisley and Donald Strachan were in partnership at the time, and there were many other circumstances which fully justified the action of the Commissioners in not recommending for confirmation these particular grants.

Mr. Searle, Q.C., replied.

Cur ad vult.

Postea (December 3.) The Court delivered judgment.

The Chief Justice said: In the view which the Court takes of this case no good purpose will be served by tracing in detail the history of Adam Kok and his tribe of Griquas. As far back as 1846, when they were still located in what is now Orange Free State territory, Sir

Peregrine Maitland, the then Governor of this colony, made a treaty with Captain Adam Kok, as Chief of the Philippolis Griquas, whereby the absolute dominium of the Chief over all the land theretofore regarded as belonging to him or his people, was "unreservedly acknowledged." The same treaty, however, places considerable restraints upon his right of alienating land and provides that the cases in which British subjects shall have purchased the absolute dominium of land shall be deemed to be cases of a hiring of such property for a term of forty years. In many respects the position of the Chief was an anomalous one. He had no right to adjudicate upon titles to land, but for that and other purposes a British Resident was appointed, the only right reserved to the Chief in this respect being that he, or his deputy, was allowed to be present and assist at the investigations. Incessant disputes as to land having arisen with the immigrant farmers from the Colony the Chief in the year 1862 made arrangements with the then High Commissioner for establishing himself and his tribe in what was then known as Nomansland, and now forms the territory of Griqualand East. It is obvious from the mass of correspondence, to which I need not refer in detail, that the Chief would not have considered himself at liberty to occupy this territory without the consent of the Governor, and that his original occupation must have been regarded by all parties as subject to any conditions imposed by the High Commissioner. One of these conditions was that the Griquas should occupy the country as British subjects, and another condition was that the Griquas were to subdivide amongst themselves the land which they were to occupy, whilst on the other hand the High Commissioner was to guarantee possession of each farm to its occupant against all British subjects, and to issue titles to this effect as soon as the surveys were completed. As a matter of fact, the Griquas were left entirely to their own devices. They had their own Executive Council and Volksraad, and the Chief, purporting in each case to act with the advice of his Executive Council, issued titles to individuals on quitrent tenure very much in the same form in which quitrent titles were granted in this colony. Among the persons to whom such titles were granted were Mr. Donald Strachan and three of his sons, the present plaintiffs. The grants are dated the 16th June, 1874, at which time the eldest of the three plaintiffs was only four the second two years old, and the third only a month old. It would appear that in March, 1872, a Government Commission had informed the Chief that the time was approaching when he would be relieved from office and direct rule would be established and that he then only expressed two desires on the subject, namely, that Government should take the initiative itself, and that the territory should not be annexed to the Colony of Natal. In that year Responsible Government was introduced into the Cape Colony and the management of the negotiations with the Chief fell to the hands of Mr. Brownlee, then Secretary for Native Affairs. In June, 1874, a conference took place between Mr. Orpen, as British Resident appointed by the Cape Government, and the Chief. The latter complained that he had never received any protection from the Government and wished to understand exactly the footing upon which he stood with Government. He had understood, he said, that subordination impiled protection; he was sick and tired of relationships which afforded him no hold whatever upon Government and which only bound him. The Resident gave a very guarded answer. He could "give no information regarding the future intentions of Government, but only assure the Chief that Government desires to do nothing but what is fair and just by him and his people." In a minute by the Secretary for Native Affairs upon Mr. Orpen's report, the former says, "While, in consequence of the independent position that we have for some years past permitted Adam Kok to occupy, I think we could not fairly have assumed authority over him without his consent, he himself has now removed the difficulty by leaving it optional to us what position he is henceforth to occupy, and I think we should at once decide to carry out the original intention regarding him, namely, placing him and his people under the Colonial Government." On the 15th of November, 1874, the then Governor accompanied by Mr. Orpen had a meeting with Adam Kok and his Raad, and handed to the Chief a memorandum stating briefly the arrangements proposed to be made for the future government of the country. The fourth clause was as follows: "Titles to land will remain in their present position, until after due inquiry they are confirmed by Government, which will deal justly and liberally with him." The Chief then submitted a counter memorandum, in which he said that although he had expected that the Cape Government would ultimately exercise sovereignty over his country, his impression was that it would be years before such sovereignty became an accomplished fact. He suggested several modifications in the terms submitted, and amongst other things asked for recognition of "all titles to land already issued

by Captain Adam Kok." The Governor in his reply stated that he could not agree to this modification "as it was known the titles were unsettled and disputed, and it could not be stated how many had been issued." In November, 1874, Mr. Brisley, as secretary to the Griqua Government, proceeded to Cape Town for the purpose, as he said in his letter to the British Resident, of arranging with the Governor "the details by which Adam Kok's function in the government of the country is for the future to be carried on." Accompanied by Donald Strachan, Brisley had several interviews with the Secretary for Native Affairs, which resulted in a definite arrangement being arrived at. The arrangement was summarised by Mr. Brownlee, in a minute of the 6th February, 1875, which was forwarded to Mr. Brisley by letter dated the 11th February. In this letter Mr. Brisley is designated as secretary to the Griqua Government and he is informed that the minute had been approved by the Cape Government. The final agreement as to titles was that "all *bona-fide* and undisputed titles to land already issued were to be confirmed by Government, in conformity with grants made by the Griqua Government." On the 8th March, Adam Kok and his Council ratified the agreement made by Brisley and Strachan with the Cape Government. In the latter end of 1875 a Commission was appointed by the Governor to make, amongst other things, "full inquiry into the affairs of the territory of Griqualand East, more especially with reference to any grants made since 1872." The Commission after fully investigating into the titles decided that those issued to Strachan's minor children on the 16th June, 1874, and several others of the same date had not been issued *bona fide* and, acting on this decision, the Government of the day refused to recognise them. The formal annexation of the country took place in 1877. The plaintiffs' father has since without success applied to Parliament for relief, and now after a lapse of twenty years since the date of the grant and seventeen years since the date of the annexation the present action is brought to compel the Government to confirm the titles. On behalf of the Government the Attorney-General has contended that the final agreement between the Government and Adam Kok imposed no legal obligation upon the former capable of being enforced by this Court and that, even if the agreement is binding, the plaintiffs are not entitled to succeed inasmuch as their title was not issued *bona fide*. I am by no means prepared to assent to the first contention. If nothing had been agreed upon as to titles the important questions would now have arisen whether the plaintiffs' title was binding upon Adam Kok and whether, if binding, it can now be enforced against the Government of the country which annexed his territory. But it is common cause that the terms of the agreement between Adam Kok and the Government should determine the plaintiffs' rights. Certain stipulations were made by Adam Kok on behalf of *bona-fide* grantees, and those grantees, after accepting the benefit of the stipulations, are entitled, upon the principle laid down in *Tradesmen's Benefit Society* v. *Du Preez* (5 Juta, 269), to recover damages from the Government upon its failing to perform its promise. The promise was made by the Secretary for Native Affairs on behalf of the Cape Government, and could not be legally repudiated by the Government after annexation. Whatever doubts might have existed before 1888 as to the jurisdiction of the Court to enforce a legal liability incurred by the Government were removed by Act No. 37 of 1888. The plaintiffs' claim arises out of a contract lawfully entered into on behalf of the Crown, and as such claim would have constituted a ground of action against a subject it is clearly cognizable by this Court. There is more force in the Attorney-General's contention that the plaintiffs' title is not *bona fide* and undisputed. Their father states that the grants were made to them as a reward for the great services rendered by himself to Adam Kok and the Griqua tribe, especially as Commissioner to Pondoland, but this is really an afterthought. It was not until 1890 that this ground was brought forward, and only after it became clear that this was the only ground on which *bona fides* could be established. The grants are silent as to their being issued by way of recompense and, although they purport to be issued with the consent of the "Raad," there is no entry in the books of the "Raad" to show that such consent was ever given. There is an entry of a payment to Mr. Strachan for services as Commissioner to Pondoland, but this entry, so far as it goes, would rather tend to negative any other form of recompense. On the same day on which this alleged reward to Mr. Strachan was given, by way of grant to his young children, several other grants of a most suspicious character were made to the personal friends of Adam Kok and Brisley, the secretary to the Government, including Adam Kok himself, Brisley himself, an illegitimate son of Brisley by a native woman, Mr. Strachan himself, and sons of Adam Kok. At this time Mr. Strachan was in partnership with Brisley as traders, and it is by no means surprising that the Commission refused to recommend the confirmation of most

of the grants made under such circumstances. Mr. Strachan has since that time advocated the claims of his children, and it certainly is remarkable that he has delayed the enforcement of his claim for so long a period. Only one of the Commissioners, Colonel Griffith, is alive, and he naturally cannot recollect all the circumstances which induced the Commission to reject the plaintiffs' claim. The evidence before us is not such as to justify the Court in holding that the titles in question were issued *bona fide*, and there must therefore be absolution from the instance with costs.

Mr. Justice Buchanan: I concur that absolution from the instance must be granted with costs. I have no hesitation in holding that the agreement between Brownlee (the representative of the Colonial Government) and Adam Kok, an agreement taken advantage of, could be enforced by action at law in this Court, but the question to which the case is now reduced is whether these grants were *bona fide* or not. I fully agree with the views expressed by the Chief Justice. I am led to this conclusion not only by the circumstances under which these grants were made on the 16th June, 1874, when changes were impending in the country, but I am also of opinion that the onus is on the plaintiffs to prove *bona fides* after such lapse of time. Considering the fact that Adam Kok and all the principal actors in the matter, except Brisley and Strachan themselves, are not available, sufficient proof of *bona fides* has not been given, and therefore these grants cannot be confirmed.

Mr. Justice Upington: I also concur. I wish it to be distinctly understood that any knowledge I have had of the land question in Griqualand East I have carefully excluded from my mind in the whole hearing of this case and in the conclusion at which I have arrived.

[Plaintiffs' Attorneys, Messrs. Van Zyl & Buissinné; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

SMUTS V. VAN ZYL. { 1894. Nov. 27th.

On the application of Mr. Rose-Innes, Q.C., to which the Attorney-General consented, the Resident Magistrate of Clanwilliam was appointed to take the evidence of Jacobus Christian van Wyk on commission, Van Wyk being unable to attend owing to failing health.

AINSWORTH V. MOSENTHAL AND CO. { 1894. Nov. 28th.

Principal and agent—Interest on disbursement—Commission—Implied contract—Consent—Payment under protest.

A., *an importer of machinery carrying on business at Johannesburg, employed* M. & Co. *as his landing agents at East London, upon certain specified terms.*

These terms were silent as to interest or commission chargeable on disbursements to be made by M. & Co. *on behalf of* A.

For a year from the date of their employment M. & Co. *charged* A. *with interest at 8 per cent. on their outlay and he settled the accounts without any demur.*

After the lapse of a year, M. & Co. *in their accounts debited* A. *with a commission of two-and-a-half per cent. on the outlay in addition to interest thereon, but* A. *immediately on receiving the first debit note objected and suggested an interview with* M. & Co's *manager at Johannesburg for the purpose of coming to an arrangement.*

At the interview the manager said that M. & Co. *would have to charge the commission and* A. *answered that he would think about it.*

After that A. *continued to employ* M. & Co., *who continued to debit him in their accounts with commission but he never consented to pay it, and there was always a balance against him on the accounts in excess of the amount of Commission.*

This mode of dealing having continued for some time, M. & Co. *threatened to retain some machinery which they had in hand unless* A. *paid the amounts appearing due to them, including interest and commission, whereupon* A. *paid the money under protest.*

Held, *in an action brought by* A. *to recover back the money, that* (1) *inasmuch as he made no objection to the interest charged, which was in accordance with mercantile usage, and having thus induced* M. & Co. *to make subsequent disbursements on his behalf, there was evidence of a contract to pay such interest, but that* (2) *as to the commission, there was no evidence of a contract to pay the same, nor was it in accordance with mercantile usage to charge it in addition to interest.*

This was an action instituted by Mr. Herbert Ainsworth, an engineer, residing at Johannes-

burg, against Messrs. Mosenthal & Co., merchants and landing and forwarding agents, carrying on business at East London.

The declaration alleged that in May, 1892, the defendants agreed with the plaintiff to act as his agents at East London in respect of landing and forwarding to Johannesburg machinery and other goods which might from time to time be consigned to the plaintiff and arrive by vessel at the port of East London. The plaintiff agreed with the defendants to pay for their services in this respect the following charges: 2s. 6d. per ton for agency, 10s. for consignment, and 2s. per ton for cranage.

The plaintiff terminated the agency in April, 1894.

The defendants rendered accounts to the plaintiff, showing charges made by them in respect of goods landed and forwarded, and showing an amount of £7 2s. 10d. due by them to the plaintiff. The plaintiff objects to certain items in the accounts charged by the defendants, namely, commission £152 12s. 3d. and interest £63 12s.

The plaintiff said that the defendants were not authorised to make these charges, and that upon the rendering of a true and proper account and debate thereof there would be found to be a large balance due by the defendants to the plaintiff. That he had a claim against the Castle Company for certain machinery, or its value (£57 6s.), which had not been delivered by the company, and that the defendants, while acting as his agents, accepted £28 13s. from the company contrary to the plaintiff's instructions, and gave the company a discharge from liability. The plaintiff claimed the balance (£28 13s.) from the defendants.

The plaintiff claimed:

(*a*) That the defendants be ordered to render a true and proper account of the transactions between them and him.

(*b*) That the defendants be ordered to debate the account and pay over to him such balance as may be found to be due and owing.

(*c*) Payment of the sum of £57 6s., the value of the machinery, less £28 credited on account.

(*d*) Alternative relief and costs.

The defendants in their plea admitted that the plaintiff disputed the correctness of the accounts, and especially objected to the charges for commission.

They alleged that in transacting the plaintiff's business they from time to time made large payments and advances on his behalf and in his interest which were not contemplated by the parties at the date of the contract, and in respect of which no provision was made. Up to 31st July, 1893, the defendants charged the plaintiff interest on the amounts so advanced, and from and after 1st August, 1893, the defendants in consequence of the large amounts of the advances necessitated as aforesaid charged in respect thereof a commission of 2½ per cent. in addition thereto. The charges were duly shown in certain statements of account which the defendants supplied to the plaintiff from time to time, and which were duly accepted by him. The defendants said that they would not have continued to act as the plaintiff's agents if the said charges had been objected to, and this the plaintiff well knew.

They further said that the charges for interest and commission were fair and reasonable, and such as were customarily made in respect of similar transactions and advances, and that they were under no obligation in terms of the original contract to make the said advances. They said that after the issue of summons they tendered the plaintiff the sum of £28 13s. referred to in the declaration, together with his taxed costs to date of tender, and that they were still ready and willing, and hereby again tendered that amount.

They said that the accounts rendered by them were correct, and that the charges made were fair and reasonable, and in accordance with law.

The replication admitted the tenders and joined issue.

Mr. Searle, Q.C., and Mr. Benjamin appeared for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Webber for the defendants.

Mr. Herbert Ainsworth, the plaintiff, said that he was an engineer and importer of machinery. Lived at Johannesburg. In 1892 Mosenthal & Co. at East London became forwarding agents to his firm. In June, 1892, he wrote to them that he was expecting machinery from America, and Mosenthal replied accepting the forwarding agency and quoting terms. The rule in forwarding from East London to Johannesburg was to prepay the railway carriage. The agents prepaid those charges. Harry Mosenthal & Co. were a firm in Johannesburg acting as agents for Mosenthal & Co. in East London. Witness usually paid the Johannesburg firm for work done. Mosenthal & Co. wrote on the 9th May, 1893, stating that they were drawing on him at sight for £721. Up to that date they had never drawn upon him; he had always had a running account and paid Harry Mosenthal & Co. at Johannesburg. Witness took orders from the mining companies, and when the machinery was delivered to the mines witness received the money and paid Mosenthals the money they prepaid for carriage. The manufacturing firms he represented did not

deal with the mining companies direct; he was responsible. Witness replied to the defendants' letter and said that it would be more convenient to pay £350. There were complaints against the railway about the way in which goods were delayed. Mosenthal & Co. subsequently wrote that they would consign some boilers to Harry Mosenthal & Co., to be delivered on payment of the carriage. They continued this new system until the business relations ceased. Mosenthal & Co. said that it was unreasonable to expect them to make such large disbursements in consideration of such small agency charges. He used to give orders on the mining companies in favour of Mosenthal & Co. First saw Mr. Green, of Mosenthal & Co., after the 18th August. Green said his firm wanted 2½ per cent. commission and witness said he could not afford it, but would think about the matter, and the question was left open. Saw one of Mosenthal's partners (Mr. Ernest Stephani) in July, 1893, with reference to securing Mosenthals in regard to the advances. He then gave them orders amounting to about £1,000 on the mining companies. The question of commission was never raised. In December, 1893, Mosenthal & Co. communicated that unless he arranged for £1,500 with H. Mosenthal & Co. they would stop goods coming forward. On the 28th February, 1894, he wrote protesting against the goods being consigned first to H. Mosenthal & Co. On 6th April, 1894, Mosenthal & Co. wrote saying they wanted witness in future to accept drafts at sight for carriage, and referred to 2½ per cent. commission. Subsequently they stopped goods, and he paid them under protest in order to release the goods, and he then transferred the agency to Spence & Drury. He did not object to a fair rate of percentage on prepaid carriage. He was paying 6 per cent., but he objected to pay 8 per cent. Legally, he did not think he was bound to pay interest, but he thought, nevertheless, he ought to pay a reasonable rate of interest. Spence & Drury did not impose any of the objectionable conditions imposed by Mosenthal & Co. He objected to Mosenthal & Co.'s charge of 2½ per cent. commission, and never agreed upon that commission with Green. He sent in his contra-account for £35. As he was anxious not to fight the case, he offered, without prejudice, to pay 10 per cent. per annum on the advances. He subsequently sent in an amended contra-account for £72. He was now suing for an amount altogether of £216 4s. 3d.

Cross-examined by Mr. Innes: Mosenthals had disbursed at different times large amounts, but after July, 1893, they of course sent the goods to their Johannesburg people.

[It was here consented that the question of interest should be common cause and that the issue be confined to commission.]

Cross-examination continued: Witness received and kept the debit notes sent by the defendants, but he wrote objecting to the charges for commission, and suggested an interview with Mr. Green. Green never pressed the 2½ per cent. commission until April or May, 1894, and witness then removed the agency.

This closed the case for the plaintiff.

William John Green, manager for Harry Mosenthal & Co. in Johannesburg, said he pointed out to Ainsworth that his firm were making large disbursements, and he said they would have to charge 2½ per cent. commission on such outlays. Ainsworth said he would take time to consider, but witness told him distinctly after that, on the 1st August, that they would not continue the business unless for the 2½ per cent. The risk his firm ran was that the mining companies only accepted Ainsworth's drafts on them on condition that the machinery was placed down in working order. The question of the 2½ per cent. was never definitely settled between himself and plaintiff, who always said he would think over it. In April, 1894, his firm would not continue the business, even with the 2½ per cent. commission, unless drafts at sight were accepted.

Cross-examined by Mr. Searle: They found that the disbursements were a bigger affair than they had anticipated.

By the Court: It was a very unusual practice in business to advance such large amounts.

Gustav Otto Steyn, manager of Messrs Mosenthal & Co. in East London, said the total advances they had made were about £7,200. On an average the money would lie out about six weeks. In two years the agency had been worth £158, and the interest charged had been £63.

After argument,

Judgment was given for the plaintiff for £152 12s. 3d. and costs.

The Chief Justice said: The evidence has been fairly given on both sides. In June, 1892, a definite contract was entered into by correspondence between the plaintiff and the defendants, and the terms upon which the defendants were to act as the plaintiff's agents at East London are clearly laid down. Nothing was said in the correspondence as to the right of the defendants to charge interest upon disbursements made for the plaintiff in the landing and transmitting of his goods, but from the very first the defendants charged interest and the plaintiff settled their accounts

without demur. The plaintiff must, in my opinion, fail upon his claim for a refund of interest. The rate is high but by mercantile custom interest is payable upon disbursements made by mercantile agents, and the plaintiff, by not objecting to the accounts for more than a year, must be taken to have acquiesced in the rate charged, viz. 8 per cent. But in addition to interest the defendants have debited the plaintiff with a commission of 2½ per cent. on disbursements made since August, 1893. As soon as the first debit note for commission was rendered to the plaintiff he wrote at once in effect: "I object to this account; I object to this charge; but on the whole I would suggest that the matter should be arranged with Mr. Green, your manager at Johannesburg." Accordingly Mr. Green did have several interviews with the plaintiff on the subject. Taking Mr. Green's evidence as to what passed it comes to no more than this. He said to the plaintiff that his firm were making large disbursements and would have to charge 2½ per cent. on their outlay, but the only answer he could get from the plaintiff was that he would think about it. From that time until the plaintiff paid the money under protest he never consented to the charge, unless his conduct must be taken to be equivalent to such consent. No doubt a person's conduct may under certain circumstances be such as to cast a contractual obligation upon him, but that can only be where the person with whom he is dealing is led by such dealings into the belief that the obligation is incurred. Thus by paying interest without demur on the first disbursements the plaintiff induced the defendants to make further disbursements in the belief that interest would be paid on them also. But the commission was never recognised as being properly charged. Until the plaintiff made the final payment under protest there was always a balance against him in excess of the commission. By letter he objected to the charge, and in his interview with Mr. Green he did not consent to pay the charge but said that he would think about it. After that the defendants continued to execute the plaintiff's orders with the knowledge that he objected to the commission. Instead of executing the orders and debiting the plaintiff with the commission, their only safe course was to refuse to execute his orders at all until he would consent to the modification of the original contract. Until such consent was obtained the plaintiff was entitled to insist upon the terms of the original contract, which certainly did not authorise a charge which, added to the 8 per cent interest (and considering that the average time during which the defendants were kept out of their money was six weeks), amounted to about 28 per cent. on the outlay. If the retention of the debit notes by the plaintiff stood by itself there would be evidence of an acceptance by him of the new terms, but taken in connection with his letter objecting to the charge and his conversation with Mr. Green, there is not sufficient evidence of a new contract. There is certainly no evidence that the charge was sanctioned by mercantile usage. The judgment of the Court will therefore be for the plaintiff for the amount overpaid under protest, viz., £152 12s. 3d., with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

LEWIS AND CO. v. MORSNER. { 1894. Nov. 29th.

Mr. Tredgold moved for the discharge of the provisional order of sequestration.

Granted.

MASTER v. WERNER AND OTHERS.

Mr. Giddy applied for provisional sentence on a security bond passed by the defendants in favour of the Master of the Supreme Court.

Granted. The Court directed that in future in cases of this kind the summons should be in the same form as in illiquid cases. There should be evidence before the Court as to the loss sustained by the estate.

MASTER v. WEINGARDT'S EXECUTORS.

Mr. Giddy applied for an order calling upon the defendants to file an account in this estate.

Granted.

MASTER v. PRINS' EXECUTORS.

Mr. Giddy applied for an order calling upon the defendants to file an account in this estate.

Granted.

HAND AND CO. V. ENGLES AND ANOTHER.

Mr. Graham applied for provisional sentence for the sum of £209 15s. 10d., goods sold and delivered.

Granted.

REHABILITATIONS.

On motion from the Bar, the rehabilitation of C. C. A. de Villiers, Charles Lewis, and Richard Curtis was granted.

PETITION OF BULTITUDE.

Mr. Buchanan moved for authority to the liquidators of the Cape of Good Hope Bank to allow petitioner to prove his claim in respect of certain note of the said bank, notwithstanding that the period for filing such claim has elapsed.

Granted.

MILES V. CLARKE.

Mr. McLachlan applied for leave to the petitioner to sue *in forma pauperis* in an action against John Clarke for the recovery of damages sustained by petitioner by reason of a breach of certain contract of partnership between them.

Referred to counsel.

COURT V. COURT.

Mr. Castens applied for leave to the petitioner to sue *in forma pauperis* in an action against his wife for divorce, by reason of her alleged adultery.

Referred to counsel.

PRETORIUS V. GREEFF.

Mr. Sheil, on behalf of the plaintiff, moved for the attachment of certain printing plant at present on certain premises in Britstown, let by the plaintiff to the defendant, pending the bringing of an action to recover rent due in respect thereof.

The Court granted an order of attachment, with leave to the respondent to move to have the attachment set aside.

POSWA V. M'BUKWE. { 1894. Nov. 29th.

Notice of appeal—Failure to prosecute—Practice.

Where an appeal from a Magistrate's judgment has been noted, but not prosecuted within the required time, and it is sought to debar the appellant from appealing, notice should be given calling upon him to show cause why he should not be debarred from prosecuting the appeal.

This was an application on notice to the respondent that an order would be applied for setting aside the notice of appeal lodged by the respondent against the judgment of the Resident Magistrate of Queen's Town given on the 25th June, 1894, in a suit in which the respondent was plaintiff and the petitioner defendant.

The petitioner was summoned by M'Bukwe for £10 damages for the alleged illegal seizure and detention of certain sheep.

Judgment was given in favour of the petitioner on the 25th June last and on the 5th July following notice of appeal was given. The appeal was not however prosecuted, and the petitioner (defendant) now prayed for an order setting aside the notice of appeal.

Mr. Benjamin in support of the application relied on *Rymer* v. *Solomon* (2 Sheil, 350).

The Chief Justice said: The notice of motion in this application should have called upon the respondent to show cause why he should not be debarred from prosecuting the appeal, and not that an order would be applied for setting aside the notice of appeal. As however the respondent does not appear to oppose, the order will be granted for what it was worth, but in future applications should be made in the proper form. It is only because the respondent does not appear that the present order is granted.

[Petitioner's Attorneys, Messrs. Scanlen & Syfret.]

CALEDON MUNICIPALITY V. BOUGAARD AND OTHERS. { 1894. Nov. 29th. „ 30th.

Municipality — Erfholders — Water — Common right—Conditions of sale—Prescription.

In the year 1812 the Government sold by public auction certain seventeen erven in the village of Caledon upon certain conditions of sale, including the condition that the erfholders should construct and maintain certain watercourses conveying water from an upper spring belonging to Government, and that such seventeen erven should, together with the erven of certain specified functionaries, be entitled to the use of such water for irrigation purposes,

The grants to the purchasers were made subject to such conditions, and the seventeen erfholders for the time being claimed and exercised the right to the exclusive use of the water for a period of eighty years.

Held, *in an action brought by the Municipality against the erfholders, that, even if the duly registered conditions of sale were not sufficient to give the seventeen erfholders the right to the exclusive use of the water, their subsequent user conferred a right by prescription upon them, and that the fact of their having permitted the Municipality to control the distribution of the water among themselves did not entitle the Municipality to deal with the water as if all the inhabitants had acquired a common right thereto under section 35 of Act 9 of 1836.*

This was an action instituted by the Commissioners of the Caledon Municipality against the defendants for a declaration of rights. The declaration alleged that the plaintiff Municipality, duly constituted and incorporated, represents the inhabitants of the village of Caledon. The defendants are the owners of certain erven in the village, and within the Municipal limits thereof.

In 1840 Caledon was duly constituted a Municipality under the provisions of Ordinance 9 of 1836, and remained subject to the said provisions until January, 1894, when it was placed under the operation of Act 45 of 1882.

A certain stream of water takes its rise upon property adjoining the village, and after flowing over the said property it flows into and over the land embraced within the Municipal limits of the said village, and has so flowed from time immemorial. The said stream is known as the Hot Bath Stream and is hereinafter designated as such.

At the date of the constitution of the Municipality, in the year 1840, the water of the Bath Stream was water to which the inhabitants of Caledon had acquired a common right, and in regard to which the Commissioners of the Municipality were thereupon empowered to frame regulations according to law. Thereafter the Commissioners duly framed regulations touching the use and distribution of the water of the Bath Stream, and altered and varied the said regulations from time to time according to law, and the said water has from and after the year 1840 been used and distributed in compliance with the regulations and by virtue thereof.

The defendants, as owners of the said erven, wrongfully and unlawfully contend that they are entitled to the sole use of all the water in the Bath Stream, to the exclusion of any other inhabitants of the Municipality. They deny the right of the Council of the Municipality to regulate or control in any way the use and distribution of the said water, and they say that Municipal regulations made in that behalf are illegal and *ultra vires*.

The plaintiffs claimed:

(*a*) An order declaring that the water of the Hot Bath Stream is water under the control and management of the Council of the Municipality, and that the said Council are entitled to regulate the supply and distribution of the said water among the inhabitants of Caledon.

(*b*) An order interdicting the defendants from in any way interfering with the distribution of the said water by the said Council.

(*c*) Alternative relief with costs.

The defendants in their plea alleged *inter alia* that the erven of which they are the present owners were specially laid out for sale by Government in the year 1812, upon the watercourse in which the Hot Bath Stream now flows, which watercourse was specially constructed by authority of Government for the benefit of the said erven.

That the said erven were thereafter, on or about 21st October, 1812, sold to the defendants' predecessors in title by Government under certain conditions of sale referred to in the title deeds of the said erven (to which the defendants craved leave to refer). The water mentioned in the said conditions is the water of the said stream.

They said that in or about 1812 the channel of the said stream was altered, and it was diverted for the benefit of the said erven.

The defendants further pleaded that the said steam is a perennial stream, and has flowed down uninterruptedly, continuously, and of right to the erven owned by them and their predecessors in title ever since 1812 in a known and defined channel, which has become the natural watercourse of the said stream, and the water of the said stream has been used continuously and as of right by them and their predecessors in title upon the said erven ever since that date, and the defendants and the other owners of the erven sold in 1812 have thereby acquired, to the exclusion of all other persons, a prescriptive right to the water of the said stream.

The defendants claimed in reconvention:

(*a*) That it be declared by judgment of the Court that the erven owned by them are en-

titled to the water of the Hot Bath Stream to the exclusion of all other erven, save such as were sold in 1812.

(*b*) That the defendants in reconvention (the Municipality) be interdicted from interfering with the free and uninterrupted use by the plaintiffs of the water of the said stream, or from diverting the said stream for the use of any other persons, either within or outside of the Municipal limits.

Mr. Rose-Innes, Q.C., and Mr. Buchanan appeared for the Municipality.

Mr. Juta, Q.C., and Mr. Sheil for the defendants.

Mr. C. J. N. Dempers, chairman of the Municipality of Caledon, deposed that he had prepared the copies of regulations and records (produced) from the Municipal books relating to the water rights and erven. Had known Caledon from 1850, and had resided there since 1852. Had frequently been a Commissioner. Feeling on the water question ran rather high, and Municipal elections turned upon it. The Drinkwater Stream was the only stream available for drinking purposes. It was also used for irrigating, &c. The defendants used the Drinkwater Stream for drinking purposes and for cattle, but not for irrigation. Other persons, however, used it for irrigation. Twenty-six years ago the Drinkwater Stream was redistributed. Caledon had grown very much, and the supply of water was not sufficient. The Commissioners had tried to redistribute the Bath Stream, but had not succeeded. They claimed in this action to have their right declared to redistribute the Bath Stream. Witness had an erf, but not in Mill-street. He had erven in Church-street. There was a Mill-street faction as against the Church-street faction. The future of Caledon depended entirely on the present case. They had tried to get water from other sources but failed.

Cross-examined by Mr. Juta: There was a good deal of difference in the Council as to whether the action should be bought. Mr. Klein was against it, and he was not a Mill-street owner Certain sluices were made by Mill-street owners at the instance of the Municipality. From 1840 down to the present day the Municipality had never touched the water belonging to the defendant erfholders. except in the one instance referred to, from 1868 to 1884. The Bath Stream was stopped running to that property in 1884. In 1884 there were resolutions passed by the ratepayers, but nothing came of them. [Mr. Juta handed in records of actions brought by the Municipality against erfholders for water rates, &c., in which it was decided by the Magistrate of Caledon that the Municipality had no *locus standi.*] If there had ever been any surplus of Mill-street water, it could not get to the Church-street side except by means of a pipe; such a pipe had never been laid down by the Muicipality.

By the Court: The Municipality proposed if the prayer of the declaration was granted to leave sufficient water for the fourteen erven. They had never gone to Parliament, but it had been suggested that if the case was lost they should go to Parliament.

Mr. A. de Possel Deydier deposed that since 1887 (except for fourteen months) he had been a Commissioner of the Municipality. He lived in Mill-street for four and a half years. and cultivated his erven there. There was always sufficient water. The surplus ran away to waste. It would be possible to increase the flow of the spring by laying down pipes, &c. During rains, the whole of the hot spring water ran to waste. All that they wanted was what the Mill-street owners did not use. To be of any use to the Municipality the diversion would have to be made above the dam.

Cross-examined by Mr. Juta: By the surplus he meant water that ran to waste. During the time he lived at Mill-street the water ran to waste on Sundays. His erf in Mill-street was the last erf, and a smaller one than the others. He never complained to his neighbours of want of water, but he had heard his neighbours complain. Knew that the erfholders took an action against Bredenkamp, the proprietor of the baths, for diverting the water. Nevertheless, the erfholders had sufficient water. His gardener Haas never complained of want of water.

Mr. Thomas Stewart, hydraulic engineer, said he had seen the springs in dispute. He gauged the yield in 1889 of the hot water supply. The yield was 105,000 gallons in twenty-four hours. This was gauged at the upper washing-place. He gauged it at the same place two months ago, and found the flow the same. He gauged it higher up, near the bathhouse, and found it about 129,000 gallons, so that 24,000 gallons disappeared in 700 yards. A saving could be effected in the water at the bathhouse. The dam at the mill would hold about a day's flow. The total average of the fourteen erven in Mill-street would be about fifteen acres, of which about thirteen acres were under cultivation.

Cross-examined by Mr. Juta: The dam would take about twenty-four hours to fill.

By the Court: He also gauged the Drinkwater Stream in 1889. It was about 50,000 gallons in the twenty-four hours. Gauged it again recently and found it 34,000 gallons. Gauged it higher

up and found that 1,000 gallons were lost. A very great saving might be effected by building a reservoir.

Mr. Stephanus Johannes du Toit, formerly a Councillor of the Caledon Municipality, deposed that he had lived in Caledon since 1848. In 1851 he bought an erf in Mill-street. The water at that time was used according to the Municipal regulations. There was always more than sufficient water. At present the water ran to waste if the dam overflowed.

Cross-examined by Mr. Juta: His erf was the first erf; never heard complaints from those lower down. There were erven that did suffer from want of water.

This closed the case for the plaintiffs.

Mr. M. D. Otto, eighty-four years of age, was examined on the incidents of his school life at Caledon when sixteen years old. The water flowing down from the Hot Stream then ran exactly as now. Only the Mill-street erfholders used the water. In 1875 he bought a Mill-street erf; nobody else except the erfholders ever used the water. There was never sufficient water. In summer there was not sufficient water for the irrigation of the erven. He used to pay rates to the Municipality for his drinking water, but he ceased to pay it in 1883 when a case was decided in the Magistrate's Court. The Church-street side never got water from the Mill-street side.

Cross-examined by Mr. Innes: The Mill-street people used the water according to the Municipal regulations, and on one occasion he wrote to the Municipality asking them to keep the dam clean; but the Municipality never did so. Paid his water rates up to 1883. The mill erven had not sufficient water.

Re-examined by Mr. Juta: Did not pay rates for the water, but for the keeping of the dam and sluice clean.

Mr. M. J. de Villiers said that he went to live at Caledon, in the mill house itself, in 1841. He left Caledon in 1844, but often visited it, and in 1862 he went back and lived in Caledon. In 1862 he lived opposite the mill. Lived there for two years, and then went to the lower part of the town for five years. In 1881 he bought an erf from Mr. Klein. Was perfectly acquainted with the water conditions. Since 1842 there had been no other than the existing streams, and the Bath Stream always flowed the same way. To his knowledge none but the erf-owners had ever used the stream. The mill was so situated that the stream might run from it east or west. The supply to the erven was always insufficient, even after it was not allowed in 1884 to go down to Mr. Truter's property. The month of April he considered a most important month for water. A reservoir should be made as recommended by Mr. Stewart. If the water overflowed the dam, which it might sometimes do on Sundays, the waste was wanted for the gardens. Remembered that in 1892 the Municipality told all owners of the erven to make sluices. Witness was one of those who had to make a sluice.

Cross-examined by Mr. Innes: The regulations were altered at various times. People always obeyed the water regulations. The other streets had their sluices already. Could only state that the ervenholders in Mill-street had to pay for their sluices. In 1840 the distribution of the water amongst the fourteen erfholders was included in the Municipal regulations. Had seen cases in which the Municipality prosecuted persons for taking the water from the fourteen erfholders. The Municipality cleaned the mill dam on some occasions, and they were applied to by the erfholders to do so. The Municipality exercised control over the supply as between the fourteen erfholders. They gave witness drinking water, and for two or three years he paid rates. Rates were levied on the fourteen erfholders, but sometimes they were not paid. In spite of Le Roux's case (won against the Municipality) some of the erf-holders paid after that, but in one year not a single one paid, but on the strength of promises to enlarge the dam, &c., they recommenced paying. A committee was appointed in 1884, of which witness was a member. Witness then offered one day's water from the erven to Church-street under certain conditions. A good deal of water ran to waste from the Bath Stream during the winter. As to whether this waste water should be stored, the water should go to the mill first. During rains the water ran to waste. In summer there was a scarcity, as some of the water was lost on its way from the stream owing to evaporation, percolation, &c. In 1885 witness voted for one day's water per week to be given to the Church-street side, but they were to receive a *quid pro quo* from the Municipality.

By the Court: The Mill-street erfowners got their water to drink from the Drinkwater Stream. He had a water cask in his yard filled from the Drinkwater Stream. When the Bath Stream was interfered with by one Esterhuizen the Municipality took action, not the erf-owners. This was on the strength of their getting the one day's water.

By the Court: The Church-street side got their irrigation water from the Cold Stream.

Re-examined by Mr. Juta: They were quite willing to pay the Municipality for cleaning the dams.

By the Court: A good deal of water ran to waste in the winter, but in the summer it did not; on the contrary, there was a scarcity. If the Municipality could save the water now lost by percolation or evaporation the Mill-street erfowners would still object, as they would wish to have the water saved for themselves. If the Municipality would save all the water now lost the erfowners would give the Municipality twenty-four hours' water per week.

The Chief Justice said that here, at any rate, was a tangible proposal. Could not some settlement be come to?

Mr. Innes said that that arrangement was proposed and fell through in 1884.

By the Court: If all the water was brought down to the mill for six days he would not object to the Municipality diverting it for one day.

Mr. Justice Buchanan: The fact is that by that arrangement you would get about one-fourth more water and give to the Municipality one-seventh.

Mr. Innes said that one objection appeared to have been that in the winter there was sufficient water for the mill and the Municipality too.

Mr. Daniel le Roux said that he was born in 1827, and had lived on the mill erven ever since. The water of the Bath Stream had always run the same way. The water was given to a Mr. Truter in 1868, and taken away in 1884. No one else ever had it. Almost all the time he had lived on the mill erven there had been a scarcity. In the summer there was no waste, but in the winter it was allowed to run to waste. In 1888 he was a member of a deputation from the holders of Mill-street erven to the Municipality. It complained that water was being diverted, and that their erven were drying up. The Municipality replied that they had no power to interfere, so the mill erfowners took action against the proprietor of the baths, with the result that the proprietor had to give up the water.

Cross-examined by Mr. Innes: In 1873 he wrote to the Municipality, asking them for the Bath Stream water for his erven.

Mr. J. H. F. Klein said he was born in 1824, and had lived all his life in Caledon. Since 1860 he had been chairman of the Municipality, but as he objected to this action being brought he relinquished his chairmanship. The water had always run the same way, and the erfholders had always used it. There had always been a scarcity of water. He protested against the water being given to Truter in 1868. Witness was an erfholder and paid rates for the sluit being kept in order by the Municipality. The water from Mill-street had never been used by Church-street, it could not be used by people living in that street.

Cross-examined by Mr. Innes: When he bought the erf in Mill-street he considered he bought the water with it. He thought that by the conditions of sale of 1812 the water belonged to Mill-street. Was an owner of Church-street erven. The Drinkwater Stream went to ten erven in Church-street, Bath Stream to the fourteen Mill-street erven, and the other erven would have no water at all. Paid rates to the Municipality while he lived in Mill-street.

Norman, a native, said he was born in 1803. He worked in Caledon at Radman's place, where the village is now. That was when he was eight years of age. The Bath Stream ran to where the mill is now and the erfholders used the warm water. Nobody else ever used the water. It had been so ever since. (Witness here named several of the erfholders.)

Mr. A. le Roux, forty-one years of age, deposed that he had lived all his life at Caledon. Was a Mill-street erfowner. There had always been a scarcity of water.

Cross-examined by Mr. Innes: Had a lead of water to his garden for three hours a week.

Mr. D. Estherhuizen said he had always lived in Mill-street, Caledon. In summer months they used all the water they could get. That had been the case always.

Cross-examined by Mr. Innes: The dam never overflowed in the summer, except in case of rain.

Mr. F. L. Estherhuizen, sixty-eight, gave evidence to the same effect.

This concluded the evidence.

After argument, the Court delivered judgment.

The Chief Justice said: This case has been argued by Mr. Innes with his usual ability and fairness, but he has not succeeded in convincing the Court that the plaintiffs are entitled to the relief they pray for. Substantially, they ask for a declaration that they are entitled to deal with the whole of the water from the Warm Baths in Caledon, for the benefit of all the inhabitants of Caledon. The fourteen defendants say that they have the exclusive right to this water, and that they have this right by grant: but that even if this grant was not sufficient to give them the full right to the exclusive use of this water, the subsequent "user" for upwards of eighty years has established their right. Now I have taken the trouble to go through all the grants, but it is not necessary for me to go over the whole of them. I find that the first dealing with the property in question occurred in the year 1805, when Governor Janssen first of all made a grant of the Warm Baths to Dr. Hassner. Minute regulations were framed in the grant, and the only reference to the water is that the water from the said sources shall have a free flow to

the neighbouring place, of which P. J. Rademan is the owner. It appears that subsequently Rademan ceased to be the owner of the lower land on which Caledon is at present situated, and negotiations were made by the Landdrost and Heemraden of Swellendam with the Government regarding the sale of the property which had been re-acquired by the Government. It seems to have been considered at the time that the stream was rather small and that it was not sufficient for the irrigation of any large number of erven, and it was stated that only seventeen erven should be sold. I am satisfied, from the whole of the correspondence which passed at the time, that that was the object of the number being limited to seventeen. It was a small stream, and it was considered that only seventeen erven could be irrigated by the stream. The question was submitted to the Landdrost Buissinné, and he on the 4th March, 1812, wrote to Alexander, the Colonial Secretary, as follows: "I beg leave to transmit a plan of the arrangements made at the Little Zwarteberg by which you will perceive that independent of the necessary allotments of garden grounds to the Deputy Landdrost, parson, and other functionaries, seventeen erven from a half to one and a half morgen in extent can be provided with water." Now with reference to that, I may at once explain that I was not quite right in saying that only seventeen erven should be irrigated. There were in addition erven set apart for the parson, Landdrost, and other functionaries. But of course that question does not enter into this case. The plaintiff's claim now is that the right shall be extended to all the inhabitants, and it is contended that it was not intended by the original grant that the right to the water should be confined to the Mill-street erfholders. The letter then proceeds: "As the Cold Stream coming from the little kloof on your side of Dr. Hassner's place proves to be extremely weak in summer, the arrangements could not well be made in any other shape, and all the gardens of the erven therefore, as well as those of the Deputy Landdrost, clergyman, and minor functionaries at said place, must be watered by the Hot Stream that comes from the springs in and near Hassner's place." The answer given by Bird, the Deputy Colonial Secretary, was on the 26th March as follows: "His Excellency likewise entirely approves of the plan you have transmitted for the distribution of the ground of the intended village, and desires that you will be pleased, in conjunction with the Board of Heemraden, to proceed to dispose of these erven by public auction upon the terms and conditions you have suggested with this additional one, that the expenses of surveying each erf and of framing the diagram thereto shall be borne by the purchaser and not be made a charge against the receipts. You will be pleased to give ample notice thereof through the medium of the public papers. His Excellency has here desired me to remark to you that it is very material that you should at a very early period examine and clear the cold springs behind Rademan's; this being the time for ascertaining their true force, from which only the value of the lower erven can be calculated." Then on the 11th August, 1812, there is a letter from the Landdrost and Heemraden transmitting a copy of the conditions under which it was intended to dispose of the ground. On the 28th August there is the answer: "I am directed by His Excellency the Governor to acquaint you, in answer to your letter of the 11th instant, that His Excellency approves of the conditions on which you intend to sell seventeen lots of land situate at the Zwarteberg." Well, these conditions are confirmed, and the conditions impose very onerous obligations upon the purchaser of each of these seventeen erven—the number is here again limited to seventeen. The fourth regulation is as follows: "Each purchaser of an erf shall be required within a period of two months from the day (of sale) to construct on the lower side of the wagon road, in a line likewise to be pointed out by the Assistant-Landdrost, a water furrow the whole width of his erf 3 feet wide and 2 feet deep, built of stone pointed in lime," and so on. I will not read all the obligations, but there is a very clear duty imposed upon every owner to construct proper watercourses along his line of erven. Then follows the grant, which contains this condition: "Subject, however, to all such duties and regulations as are either already or shall in future be established with regard to such lands, and further, under such conditions as are stipulated in the deed of sale." Now it does not appear that any other erven were ever transferred to erfholders upon similar conditions. There is no doubt it would appear from the correspondence that the right was reserved by Government in case the stream thereafter increased in volume. That was the right reserved by Government; but in point of fact that right never seems to have been exercised. In 1830 a fresh grant of the Warm Baths was issued in favour of Brink, and that grant contains a condition which certainly is the strongest condition in favour of the plaintiffs that has yet been referred to. The sixth condition says: "The springs from

which the village of Caledon is supplied with water from his estate are to be kept by the purchaser in such a cleanly state that no obstruction of the watercourse to Caledon can take place, it being distinctly understood that from that source Caledon shall at all times be supplied with water; otherwise the special Heemraden at Caledon or a commission from the Board of Landdrost and Heemraden at Swellendam shall be at liberty to take such measures as may be deemed necessary to clean the said watercourse at the expense of the possessor." Now Mr. Innes argues very fairly that this shows that there was the intention to reserve this water for the village of Caledon, but I think it is only fair to consider this in connection with what had preceded it in the village itself. It would be quite consistent, under the conditions of this grant, to hold, when it refers to the right of the village of Caledon, that it refers to the right of those occupiers of erven in the village of Caledon who had acquired the water rights, and if it is so the whole thing is explained, and it does not follow that there was any intention on the part of the Government of that time to give the right to any beyond the seventeen. At all events, if such was the intention of the Government, it would not have been done by way of conditions inserted in the grant to the Warm Baths, but it would have been by way of a grant made to subsequent erfholders in the village of Caledon. I asked Mr. Innes to produce a single grant of other erven with the conditions mentioned, and he candidly admitted that there were none. In 1840 the Municipality was established, and there is no doubt they dealt with this water, and that they considered the water was the common right of the inhabitants, and Mr. Innes contends that inasmuch as the seventeen owners allowed the Municipality to deal with it, they lost any exclusive rights they might otherwise have had. But I think the "common right" was confined to the seventeen, but even if it was not so confined, the mere fact that the Municipality dealt with the water it distributed amongst these seventeen—or rather I might say fourteen, but I will say seventeen for the present — does not give anyone outside of these the right to the water, and the Municipality confined it to these seventeen. Under all the circumstances, the owners of the seventeen erven had very good grounds for believing that the right belonged to them. In my opinion they thought so. I am perfectly satisfied from the evidence that these people were convinced that they and they alone were entitled to the exclusive right of the water, and that if they did receive the assistance of the Municipality from time to time, or apply for assistance to the Municipality from time to time, it was for the purpose of distributing the water amongst those seventeen, and for no other purpose whatever. They insisted by right that the water should be distributed amongst them alone, and these fourteen as a class have from the year 1840 up to the present time had the exclusive right of that water whenever it was necessary for their purposes. During the summer seasons it is clear from the evidence that they insisted upon the right to use all the water, and did so use it to the exclusion of any other owners in Caledon. Then you have the further significant fact that the Municipality in their regulations—the 31st regulation—admit that there are erfholders in the town of Caledon who have acquired irrigation rights by prescription or otherwise. Now that cannot refer to the other water, because that was drinking water, and the only irrigation water was the Bath water, and the 31st regulation in my opinion cannot by any possibility refer to any other water than this Bath water. The 31st regulation is as follows: "All garden erven that have acquired irrigation rights by prescription or otherwise, shall be bound within a reasonable time after receiving notice from the Council to that effect, to furnish and build in, at their own expense, and to the satisfaction of the Council, sluices at the spot or spots in the main furrows where he or she turns the water from such main furrow, such sluice to be constructed of the material and on the plan fixed by the Council. All defaulters who shall fail or neglect to put up such sluices, after notice from the Council, shall be liable to a fine not exceeding £2 sterling, which penalty shall be repeated every month, until such defaulting occupier or proprietor, either of which may be proceeded against, shall have put up such sluice or sluices." For these reasons it appears to me that the plaintiff really cannot succeed in this action. I regret very much that the parties have not been able to arrive at some arrangement, because it does seem to me rather a "dog in the manger" policy on the part of the defendants to refuse to allow the Municipality to make improvements, if such improvements can be made without detriment to themselves. Of course, if they insist upon their strict rights, nobody can find much fault with them. It seems to me also that the plaintiffs were quite justified in coming to court. It was a case in which there were many difficulties and legal questions which could never be properly tested without an appeal to the Court, so that I think the Municipality was quite justified in

coming to the Court with this action, but that cannot be any ground to alter the usual rule as to costs; besides, I suppose that, being a public expense, they will fall on the defendants also. Absolution from the instance, therefore, is granted with costs.

Mr. Justice Buchanan; I agree on the ground that the Municipality has altogether failed to establish the right to take this water for all the inhabitants of Caledon. I prefer to take the defence set up by the defendants on the prescriptive use of the water, rather than upon any grant; and I think the result of the evidence is that the inhabitants who own these seventeen erven have acquired the sole right to the use of the water that comes down to them. As to the desirability of coming to some amicable arrangement, the seventeen erfholders must consider their position well. I think the evidence has shown that although they have the sole right to use the water that comes down to them, they cannot compel the Municipality to bring down more water for their benefit, and it is still a question whether any erven above theirs cannot be laid out, and receive water from this stream, or whether any other erven cannot be joined to the seventeen in its use.

Mr. Justice Upington: I also am of the same opinion. I think it is much to be regretted that some settlement has not been arrived at. In the case of a rising township it is very much to be regretted that people like these cannot together come to some arrangement to give a water supply, which is one of the most important considerations in a country like this.

[Plaintiffs' Attorneys, Messrs. Scanlen & Syfret; Defendants' Attorney, Paul de Villiers.]

PROVISIONAL ROLL.

LOAN M. AND M. AGENCY V. REED.

Mr. Spencer moved for provisional sentence for £200 due on a mortgage bond, with interest at 6 per cent. from July 1, 1894.

HOFMEYR AND REGTER V. WAHL.

On the motion of Mr. Buchanan, the final order of adjudication was decreed.

DYER AND DYER V. BOTHA.

Mr. Buchanan applied for the final adjudication of defendant's estate.

Order granted.

LOUW V. MALAN AND SMUTS.

Mr. Graham moved for judgment for £34 17s. 2d., goods sold and delivered.

Granted.

MOODIE V. HAMPET AND ANOTHER.

Mr. Buchanan applied for provisional judgment for the sum of £1,463 15s. 5d., with interest at the rate of 10 per cent. per annum, less £48 paid on account.

Granted.

ADMISSION.—*Ex parte* RAYBOULD.

Mr. Buchanan applied for the admission of Mr. Alfred Jones Raybould as an attorney of the Supreme Court.

Mr. Raybould took the oaths and was duly admitted.

REHABILITATION.

On motion from the bar, Wm. Adriaan Retief was rehabilitated.

GENERAL MOTIONS.

KLAIBER V. KLAIBER.

Mr. Graham moved for an order to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against respondent, her husband, fo restitution of conjugal rights, failing which for dissolution of the marriage subsisting between them, by reason of his malicious desertion.

Order granted.

THE PETITION OF JNO. CAMP.

Mr. Watermeyer moved for an order to make absolute the rule *nisi*, issued under the Titles Registration and Derelict Lands Act, for transfer to petitioner of certain lot of ground, being lot No. 69 of the divided estate Modder River, now called Springfield, at Wynberg, the same having been duly purchased by petitioner in 1857, but, through negligence, never transferred.

Order granted.

MAKALELA V. MAKALELA.

Mr. Tredgold moved for an order to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties, by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights.

Order granted.

HENNINGS V. HENNINGS.

Mr. Currey moved for an order to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties, by reason of espondent's failure to obey the order for resti-

tution to his wife of her conjugal rights, and for a division of the property held in community, and a declaration that applicant is entitled to the custody of the children of the marriage.

Order granted.

VERMAAK'S EXECUTORS V. VERMAAK AND OTHERS.

Mr. Innes, Q.C., moved for an order to make absolute the rule *nisi* for a decree of perpetual silence against the respondents in respect of certain action which they allege they had against applicants in their said capacity.

Order granted.

IN THE ESTATE OF THE LATE LAVINIA BROWN.

Mr. Buchanan applied for authority to the Master of the Supreme Court to pay out to Charles W. F. Brandt the amount realised from the said estate, he being entitled thereto by reason of his marriage in England with the said Lavinia Brown, then Greenwood, under the correct name of Brandt, but being generally known as Brown.

Order granted.

SIEBERT V. SIEBERT.

Mr. Watermeyer moved for an order to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties, by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights, and for a declaration that she is entitled to the custody of the children of the marriage.

Order granted.

KUNNE V. ROUBINEK.

Mr. Sheil applied for an interdict restraining the respondent from entering the premises where applicant carries on his business of a brass and iron founder, or in any way interfering with the same, and from collecting any moneys appertaining to the said business.

Order granted, with leave to the respondent to apply for the discharge of the interdict on showing good grounds.

COURT V. COURT.

Mr. Castens moved for a rule *nisi* requiring petitioner's wife to show cause why he shall not be admitted to sue her *in forma pauperis* in an action for divorce, by reason of her alleged adultery.

Rule granted, returnable on the 2nd January.

MILES V. CLARK.

Mr. McLachlan moved for a rule *nisi* to sue *in forma pauperis*.

Granted.

LAWRENCE V. LAWRENCE.

For an order extending the period allowed to the defendant to file her warrant to defend the proceedings instituted by the plaintiff for restitution of conjugal rights, and requiring the plaintiff to provide her with £50 for the costs of such defence, and further, for a commission *de bene esse* to take her evidence in England, together with the evidence of such witnesses as she may produce.

Mr. Innes, Q.C., for the applicant.

Mr. Watermeyer for the respondent.

By consent the first and third prayers were granted, and no order made in the second. Costs in the cause.

BRAUDE V. VERDOES.* 1894. Nov. 30th. Dec. 3rd. „ 4th.

This was an action instituted by the plaintiff against the defendant to compel him to pass a mortgage bond.

The declaration alleged that in October, 1893, the plaintiff entered into an agreement with the defendant through his agent, one Keyter, by which the former agreed to advance the latter the sum of £1,000, to secure the repayment of which the defendant was to pass a first mortgage on his farm Kliprug and two adjoining pieces of ground. That the plaintiff subsequently paid the £1,000 to Keyter on behalf of the defendant, but that the latter refused to pass the bond.

The plaintiff claimed:

(*a*) An order compelling the defendant to pass in favour of the plaintiff a first mortgage bond upon the farm Kliprug and the two pieces of ground adjoining for the sum of £1,000, with 6 per cent. interest from February 1, 1894; or, in default thereof,

(*b*) An order directing the defendant to pay to the plaintiff the sum of £1,000, with interest at 6 per cent. from February 1, 1894.

(*c*) Alternative relief with costs.

The defendant in his plea denied that he entered into any agreement with the plaintiff as alleged in the declaration, and that Keyter was his duly authorised agent to enter into the said agreement. He alleged that he was not aware that the plaintiff paid the £1,000 to Keyter, and he denied that Keyter was authorised by him to receive the said money on his account.

Mr. Rose-Innes, Q.C., and Mr. Webber appeared for the plaintiff.

Mr. Juta, Q.C., and Mr. Molteno for the defendant.

* During the hearing of the case the defendant committed suicide and the action was stayed.—REP.

BAATJES V. BAATJES. { 1894. Dec. 3rd.

This was an action for divorce instituted by the plaintiff against his wife on the grounds of her adultery.

Mr. Currey for the plaintiff.

The defendant in default.

Mr. Norman Lacy, of the Colonial Office, gave formal evidence of the marriage of the parties.

Henry Johannes Baatjes, the plaintiff, deposed that the marriage took place at Caledon twelve years ago. He and his wife lived happily until they met Samuel Schroeder. He was very attentive to plaintiff's wife, and at last they ran away. Witness condoned this, and took her back. She remained six months, but ran away with Schroeder again six years ago and had not returned. It was said that the two now lived at Newlands. There were three children of the marriage, who were all living with his wife's parents. He wished now to have the custody of them. He treated his wife well. Had recently seen his wife in Cape Town.

Philippa Cole, living at Newlands, deposed that she knew Mrs. Baatjes, who was now living at Newlands with Schroeder as his wife.

Decree of divorce granted with custody of the children.

KLAIBER V. KLAIBER. { 1894. Dec. 3rd.

This was an action for restitution of conjugal rights.

Mr. Graham for the plaintiff.

Defendant in default.

Mr. Norman Lacy gave formal evidence as to the marriage of the parties.

Anne Maria Christina Klaiber said that she was married on the 10th February, 1890. She and her husband were only happy for a very short time. Her husband drank very heavily and the house was broken up, and they both went to live with her father. Three months after the marriage her husband left her and never returned. She was told that he went to Germany. Had not contributed anything towards her support, and she had been living with her father ever since. There was one child, which died when three months old. Her husband was, she believed, now in Wurtemberg, Germany. Her father kept the German Club in Long-street. Did not know what his income was. Knew her husband had been convicted in Germany for bigamy. She now sued for restitution of conjugal rights.

Decree granted for restitution of conjugal rights; defendant to return on 15th April next, failing which to show cause on 1st May why a decree of divorce should not be granted.

DASILVA V. DASILVA. { 1894. Dec. 3rd.

This was an action for restitution of conjugal rights.

Mr. Jones for the plaintiff.

Defendant in default.

Mr. Norman Lacy gave formal evidence of the marriage of the parties.

Sarah Dasilva, plaintiff, said she was married at George in 1886. Her husband left her without her knowledge four months after the marriage, and went to Knysna. He returned, but, having stolen something at George, ran away to Oudtshoorn. Witness brought him back, but subsequently he went away to Mossel Bay. She followed him there, and lived with him there. He ill-treated her, and finally left her on the 13th June, 1888, and went to Oudtshoorn. Heard he went to Johannesburg. She had attempted to find him, but did not succeed until May of 1893, when she discovered him in Port Elizabeth. She offered to go back to him, but he was half drunk, and took a knife threatening to injure herself and the child.

Decree of restitution granted; defendant to return or receive his wife on February 1, failing which to show cause why a decree of divorce should not be granted, with an order for maintenance of £1 per month.

CLARK V. JOHNSON. { 1894. Dec. 3rd.

Husband and wife—Assistance of wife—Power to sue—Magistrate's Court Act, 1856, section 15—Wages of wife—Community of property.

The plaintiff, a woman married in Community of property, sued the defendant in a Magistrate's Court for wages earned as nurse to defendant's wife.

The power to sue and the summons stated that she was assisted by her husband, and the power to sue was signed by both.

Held, *that a cause of action had accrued to the plaintiff, and that, although married in community, she was entitled under the 51st section of Act 20 of 1856 to sue in the Magistrate's Court as plaintiff assisted by her husband.*

This was an appeal from a decision of the Resident Magistrate of Port Elizabeth in an action in which the present appellant, plaintiff in the Court below, sued the respondent (defendant) for £3, work and labour done and per-

formed, as the summons alleged, for and on behalf of the defendant, and at his special instance and request in and about the nursing and attendance upon the wife of the defendant during her confinement in the month of October, 1894.

The summons alleged that the plaintiff, Caroline Clark, was duly assisted by her husband, John Clark, as far as need be.

The power to sue was signed by the plaintiff, and by her husband as assisting her.

The defendant excepted to the summons on the grounds that the plaintiff's husband should have sued, and not the plaintiff, he being resident within the jurisdiction of the Court.

The Resident Magistrate sustained the exception and dismissed the case with costs. The following were his reasons:

The defendant excepted that plaintiff should not sue since she has a husband resident within the jurisdiction. This fact is not disputed. The question is, has a married woman the necessary *locus standi in judicio?* It was stated that the plaintiff and her husband were married without ante-nuptial contract.

By section 51, Act 20 of 1856, a married woman can sue unless the defendant shall show that she has a husband resident within the jurisdiction. Even in this case she may sue if he refuse to allow her to bring the action without just and reasonable cause for such refusal.

In this case it is plain that the plaintiff has a husband within the jurisdiction, and so far from plaintiff proving that he refuses to allow her to bring the action, it appears from the summons he is willing to assist her.

I am of opinion that a woman married by ante-nuptial contract must sue, assisted by her husband, except in the case contemplated by the 51st section of Act 20 of 1856. I consider that a woman married without settlements cannot sue even assisted by her husband (except under the 51st section); that the husband is the proper person to sue in such a case as this, and that the plaintiff has not the *locus standi in judicio*. See the case of *Prince* q.q. *Dieleman* v. *Anderson and Others* (1 Menz., 176).

From this judgment the plaintiff now appealed.

Mr. Sheil in support of the appeal: The Magistrate clearly erred. The plaintiff was duly assisted by her husband. The case of *Prince* v. *Anderson* is an authority against the Magistrate's decision, *Snook* v. *Bosman* (2 E.D.C., 201) and *Jackson* v. *Humphrey* (4 C.L.J., 234) are much more in point.

The respondent did not appear.

The Court allowed the appeal.

The Chief Justice said: Whatever doubts there might have been as to the ordinary law are removed by the 51st section of the Magistrate's Court Act. The plaintiff is a married woman and she sues for wages for work and labour done by herself personally as nurse. The summons alleges that she is duly assisted by her husband, and the allegation is borne out by the power to sue which is signed by both of them. The defendant, however, excepted to the summons on the ground that the plaintiff's husband, being within the jurisdiction, should have been the nominal plaintiff. Even if the action had been brought in this Court the case of *Prince* v. *Anderson* (1 Menz., 176), which was cited by the Magistrate in support of his judgment allowing the exception, would not have been in point. There the married woman, being a defendant, wished to appear and judicially acknowledge the debt without the consent of her husband, here the married woman claims wages earned by herself and she does so not only with the consent but with the active assistance of her husband. After having signed the power given by his wife, which purports to be given with his assistance, he could not afterwards sue the defendant for the same debt, so that the defendant could not be prejudiced by the form of the action. But, as I have remarked, the 51st section of the Act places the matter beyond doubt in regard to the Magistrate's Court. That section makes no difference between those who are married out of community and those who are married in community. If the married woman has a husband within the jurisdiction who has not, without just and reasonable grounds, refused his assistance, then she is not entitled to sue without such assistance. But with his assistance she is entitled to sue in the Magistrate's Court for any cause of action which has accrued to her. That assistance the plaintiff had obtained in the fullest sense of the term, and therefore the exception ought not to have been allowed. The appeal must be allowed with costs.

Their lordships concurred.

[Appellant's Attorney, C. C. Silberbauer.]

STRYDOM v. STRYDOM'S TRUSTEE. { 1894. „ 3rd. Dec. 12th.

Usufruct—*Fidei-commissum*—Right of reversion — Vesting — Will — Insolvency—Rehabilitation.

The question whether or not a testamentary gift is to vest in the object of the gift immediately upon the death of the testator is a question of intention.

Where the gift is in favour of a person in existence at the time of the testator's death, without any intimation of a desire to suspend or postpone the operation of the gift, there exists a conclusive presumption that the testator intended to confer an immediately resting interest.

Where the operation of the gift is suspended pending an intervening life interest, the presumption, in case the person having the life interest is a usufructuary, is that the gift was intended to vest upon the death of the testator, and in case such interest is in the nature of a fidei-commissum *the presumption is that the vesting was intended to be postponed until the death of the fiduciary heir or legatee.*

The case of In re Zipp (Buch, 1878, p. 132) *explained.*

A husband and wife, by their mutual will, appointed the survivor as sole heir, and by their codicil bequeathed, "after the death of the survivor," *a certain farm to the plaintiff.*

Held, *that a usufruct was conferred on the survivor, that the right of reversion vested in the plaintiff upon the death of the first dying, and that this right having accrued before the confirmation of the account in the plaintiff's insolvent estate vested in his trustee.*

This was an argument on an exception to the plaintiff's declaration, which alleged that by a codicil dated 26th January, 1861, made by virtue of the reservatory clause contained in a mutual will dated 30th June, 1855, the late A. G. Greef and his surviving spouse, C. E. D. Greef, declared as follows: "We hereby bequeath after the death of the survivor of us to our god-child (the plaintiff) our shares in the farms Zeekoe Rivier and Welbedacht, situate in the district of Oudtshoorn, for the sum of £75 sterling."

The testator died prior to the year 1879, leaving the will and codicil of full force and effect. The testatrix, who is still living, adiated and accepted benefits under the mutual will and codicil, and in the year 1879 she transferred to the plaintiff half of the share in the farm Zeekoe Rivier bequeathed to him.

On 12th October, 1881, the plaintiff surrendered his estate, and a trustee was duly appointed. Accounts were filed by the trustee, and on 23rd November, 1882, a third and final account was filed and duly confirmed. In none of the accounts is the half-share in the farm Zeekoe Rivier included or dealt with, and the trustee and the creditors of the estate had full knowledge of the facts above stated. In the year 1890 the plaintiff was rehabilitated.

In the present year 1894, and prior to the month of September, the defendant was appointed trustee of the insolvent estate, and in the month of September the defendant publicly advertised that he would sell by public auction the right, title, and interest of the plaintiff in the said remaining half share of Zeekoe Rivier bequeathed as aforesaid.

On 17th September the plaintiff obtained an interdict from the Hon. the Circuit Court for Oudtshoorn restraining the defendant from proceeding with the said sale, pending an action to be brought by the plaintiff for a declaration of rights.

The plaintiff claimed:

(*a*) A declaration of rights that the defendant in his capacity as trustee was not entitled to the said share in the farm Zeekoe Rivier, bequeathed to him as aforesaid after the death of the testatrix.

(*b*) A perpetual interdict restraining the defendant from selling, disposing, or otherwise interfering with the said share.

(*c*) Alternative relief with costs.

To this declaration the defendant excepted on the grounds that the facts as alleged showed no cause of action.

Mr. Rose-Innes, Q.C., was heard in support of the exception.

Mr. Juta, Q.C., for the plaintiff.

Curia ad vult.

Postea (December 12.)

The Court delivered judgment allowing the exception.

The Chief Justice said: The facts stated in the declaration are briefly as follows: By the joint will of the testator and his wife the survivor was appointed sole heir of the first dying, and by a codicil to their will the testators bequeathed, "after the death of the survivor," to the plaintiff certain farms for a nominal price. The testator died in 1879, and his wife confirmed the will and accepted benefits thereunder. In the same year she transferred one-half of the farms to the plaintiff. In 1881 the plaintiff became insolvent, and in the following year the liquidation account of his estate was duly confirmed. In that account the right to the remaining half of the farms was not included as an asset. In 1890 the insolvent was rehabilitated, and in 1894 the trustee of his insolvent estate gave public notice of his intention to sell the plaintiff's right, title, and

interest in the remaining half-share of the farms. The plaintiff by his declaration prays for an interdict restraining such sale, and to this declaration the defendant has excepted that it discloses no ground of action. For the purpose of deciding on the exception, the facts stated in the declaration must be taken as admitted. The points of law to be determined are of considerable importance in the construction of wills and the administration of insolvent estates. The question whether or not a testamentary gift is to vest in the object of the gift immediately upon the death of the testator, must always be a question of intention. Where the gift is in favour of a person in existence at the time of the testator's death, without any intimation of a desire to suspend or postpone the operation of the gift, there exists a conclusive presumption that the testator intended to confer an immediately vesting interest. If the gift contains words of futurity, the question arises whether they have been inserted for the purpose of postponing the vesting or point merely to the deferred enjoyment. The cases in which such a question has most frequently arisen in this Court are those in which a gift to one person is subject to a life interest in favour of another. In such cases it always becomes a matter of importance to ascertain whether the person with the life interest has only the usufruct, or whether the ownership was conferred on him, subject to a *fidei-commissum* in favour of the remainderman. In the former case the presumption is that the testator intended the gift to vest immediately upon his death; in the latter case the presumption is that the testator intended to postpone the vesting until the death of the person having the life interest. The law on this point was briefly discussed in the case of *In re Zipp* (Buch. 1878, p. 132), and it certainly was not intended to be there laid down that other indications of the testator's intention cannot be allowed to prevail over either presumption. There have been cases in which the right of a legatee to a legacy payable after the death of a usufructuary has further been made conditional on a contingency personal to the legatee, such as marriage or majority, events or dates uncertain, which may never take place or arrive, and in such cases the presumption in favour of immediate vesting has been held to be rebutted. On the other hand, the fact that the prior interest is in the nature of a *fidei-commissum* is not conclusive proof that the testator intended to postpone the vesting until the termination of such prior interest. A *fidei - commissum* may be so purely in the nature of what the English law terms a trust as not to interfere with the vesting of the fidei-commissary legatee's interest even before the arrival of the time for the payment of the legacy. An instance in point is mentioned by *Voet* (7, 1, 12), where a testator bequeathed a sum of money to his foster child and directed the money to be transferred to another person as fiduciary, who was to pay interest to the child until it reached his twenty-fifth year when the capital was to be paid to him, and it was held that upon the death of the child before reaching that age he transmitted his fidei-commissary right to his heir. The obvious ground upon which this decision rested was that the expressions used by the testator pointed merely to the deferred enjoyment of the capital sum and were not inserted for the purpose of deferring the vesting. In the case of *Quin* v. *Baartman* (Buch. 1870 p. 78), the prelegacy to one of the testator's heirs was subject to a *fidei-commissum* during the lifetime of the testator's spouse, but the right to the reversion was held to vest in the legatee upon the death of the testator and before the death of the fiduciary legatee. This decision, as I have before had occasion to remark, can only be supported on the ground that there occurred expressions in the will which in the opinion of the Court overcame the presumption, arising out of the fidei-commissary nature of the bequest, that the vesting was intended to be postponed until the death of the fiduciary legatee. In the case of *Rahl* v. *De Jager* (1 Juta, 38), husband and wife by their mutual will appointed their children as their sole heirs, and bequeathed, after the death of the survivor, their immovable property to their sons, and it was held that the survivor, after adiation, retained only a usufruct in such immovable property. The presumption that the vesting was intended to take place before the death of the usufructuary was held not to be rebutted, and accordingly the share of one of the legatees, who predeceased the survivor, was held to have been transmitted to his heirs. The present case differs from the last mentioned in this, that the gift to the remainderman is by codicil, and that the will itself appoints the surviving spouse, and not the remainderman, as heir. It does not, however, necessarily follow that the surviving spouse was intended to be burdened with a *fidei-commissum*. The testators, after disposing of their joint estate by their will, took the farms now in question out of the joint estate by their codicil, and indicated the plaintiff as the person to whom they should go. He is not to have the enjoyment of it until after the death of the survivor; but the codicil contains no expression from which a

fidei-commissum can be implied. The effect of the brief language used in the codicil appears to me to be that the survivor shall retain the usufruct only during his or her life, and there is nothing to rebut the presumption arising out of such a bequest that the right is to vest immediately in the remainderman. He, therefore, upon the death of the testator acquired a vested right of reversion in respect of the farms which by virtue of the 48th section of the Insolvent Ordinance became vested in the trustee of his insolvent estate before the confirmation of the account. The exception therefore to the declaration must be allowed with costs, with leave to the plaintiff to amend his declaration.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Findlay & Tait; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

WASSERMAN v. LEVIN. { 1894. Dec. 4th.

Master and servant – Disobedience—Misconduct—Wrongful dismissal.

A cutter employed by contract in a tailoring business, having deliberately refused to obey his master's order that he should give work to a competent tailor employed in the same business, for whose work the master undertook the responsibility, was dismissed from the service.

Held, *in an action for damages for wrongful dismissal, that the order was a lawful one, and that the deliberate refusal to obey it justified the dismissal.*

This was an action for damages for breach of contract instituted by Mr. Michael Wasserman, a cloth-cutter, residing in Cape Town, against Mr. Benjamin Levin, of the Economic Stores, Plein-street.

The declaration alleged that on or about the 16th April, 1894, and at Cape Town, the plaintiff and the defendant entered into a written agreement, in terms of which the plaintiff agreed to act as a cutter to the defendant for a period of two years commencing from 1st July, 1894, in consideration of the defendant paying the plaintiff as salary £12 per month for the first six months of his engagement, £16 per month for the second six months, and £20 per month during the second year of his engagement.

That it was further provided by the agreement that during the continuance of the plaintiff's engagement, or any renewal thereof, or any earlier determination thereof, the plaintiff should not be at liberty to do cutting either for himself or for anyone else, either in Cape Town or in the neighbourhood within a radius of ten miles thereof.

The plaintiff duly carried out his part of the said agreement, and commenced his services, and continued to discharge all his duties to the defendant in an honest, faithful, and efficient manner until 28th August, 1894, on which date the defendant wrongfully and unlawfully, and without just cause dismissed the plaintiff from his service, and repudiated and determined on his part the agreement hereinbefore referred to.

That by reason of the premises, the plaintiff was entitled to demand from the defendant the sum of £381 16s. 2d., being the balance of the fixed salary which would have accrued and been payable to the plaintiff under his agreement with the defendant but for the aforesaid wrongful dismissal.

That the plaintiff had tendered and offered, and hereby again tendered and offered, to render faithfully, honestly, and efficiently, all the services stipulated to be rendered by him to the defendant, but that the latter had refused to accept such services, or to pay the sum of £381 16s. 2d.

The plaintiff claimed:

(*a*) Judgment for the sum of £381 16s. 2d. with interest *a tempore moræ*, or in the alternative £400 damages.

(*b*) Alternative or general relief, with costs.

The defendant admitted the contract and its terms, and specially pleaded that on or about the 27th or 28th August, 1894, the plaintiff was guilty of breach of contract and of his duty towards the defendant by wilfully and repeatedly refusing to obey and carry out the lawful orders and directions of the defendant in and about the discharge of his duties as a cutter. That the defendant thereupon, as he had a right to do, dismissed the plaintiff from his employment, and terminated the contract on the 28th August.

He denied that the dismissal was wrongful or that the plaintiff was entitled to the sum demanded.

He admitted that after he had dismissed the plaintiff the latter again tendered his services, which he refused to accept. He admitted his refusal to pay the sum demanded, but alleged that before the action was brought he paid the plaintiff the full balance of salary owing to him up to the date of his dismissal.

The replication joined issue.

Mr. Sheil appeared for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Buchanan for the defendant.

Michael Wasserman, the plaintiff, deposed that he was a cloth-cutter. He served his time in

Paris. In April of last year he entered into a written agreement with Mr. Levin for two years. He was to receive £15 per month for the first six months, £16 for the next six months, and £20 for the last twelve months. Witness cut a suit of clothes for defendant before the agreement was signed as a test of what he could do. Prior to the engagement Levin told him he was going to open a tailoring branch. Witness was his first cutter, and he started work under the engagement on the 1st July. Witness engaged the tailors for the new branch. This was the legitimate duty of the cutter. Defendant never found any fault with witness. Did his work honestly and well, and matters went smoothly until Saturday, 25th August. On that day Levin told him to give work to one Schneider, whom witness had dismissed for having allowed a pair of trousers, which had been burnt, to be sent down to the shop before witness had seen them—all work having to pass through witness hands before it left the workshop. Witness was responsible for the tailors' work, and therefore was entitled to dismiss Schneider, who spoilt goods. Levin thought that the apprentice had spoilt the trousers and told witness to dismiss the apprentice, which he did. Witness, however, thought that Schneider was to blame. Schneider would not carry out witness's instructions, but insulted him. Mr. Levin told witness to give Schneider work, but witness refused unless Levin undertook to be responsible for his work and this Levin refused to do. Whilst matters were in this unsatisfactory condition he received a letter from Mr. Levin's lawyer, complaining that witness was not carrying out the terms of his contract and was rendering himself liable to dismissal. Witness then said he would not engage Schneider unless Levin would be responsible for his work. Subsequently on 28th August he received about 10.35 a.m. final notice in a letter from Levin to give work to Schneider, and he (Levin) would be responsible. Witness could not read English; the letter was read to him at twelve o'clock. He then saw by the letter that he was instructed to give work to Schneider by eleven o'clock. He returned after dinner and told Levin that he would give Schneider work in accordance with the letter, but Levin replied that it was too late. Levin also said that the agreement was broken, and that they had better enter into another agreement. Levin told him what the new agreement would be. The offer was £20 per month (or £8 per month more), but under such conditions as witness would not accept, and he accordingly left. He offered to do his work under the original agreement, but Levin would not accept. He and Levin were not bad friends. Levin offered him £8 per month more, but on the condition that he could dismiss him without notice. Had done some work as a tailor, but not as a cutter, since his dismissal. Had good experience as a cutter, but when he left Levin's service, he left nearly a hundred patterns cut by him with Levin, which were valuable to Levin.

The Chief Justice: I suppose the witness can get the patterns.

Cross-examined by Mr. Innes: Levin paid the tailors, but witness was responsible for bad work, but had never actually been made to pay anything for bad work done by the tailors. The work was inspected by Levin before it went out. When Levin told him he discharged the apprentice, but not because he was in the act of taking out spoiled goods without submitting them to his inspection. Levin also stopped the apprentice's wages, and witness was of opinion that Schneider should pay them. Eventually witness paid the apprentice voluntarily out of his own pocket. Levin said that as he was the master he would keep Schneider in his shop; witness agreed to this, but said that he could not give Schneider any work out of his department unless Levin held himself responsible. Schneider sat all that day in the shop without work. Levin told witness to consult his friends on the position he was taking up, and subsequently Levin brought Mr. Buissinné, his lawyer, to witness. Levin then said he had heard what the lawyer said, and he could go out for an hour and consult his friends, but witness said he would go out after business hours. The next morning witness told Levin that he had consulted his friends, who had told him that he need not give Schneider any work. Levin said, "I will give you a letter and you can go out and see your friends." Witness went out after eleven o'clock. Did not know that the letter gave witness till eleven o'clock to carry out Levin's order.

By the Court: He was a Russian and could speak Russian, French, and English, but could not read any of those languages, not even Russian.

Re-examined: When he returned on the 28th August Levin said it was too late, as the letter said the work had to be given by eleven o'clock. The new agreement proposed by Levin was that he should at once receive £20 per month, with the conditions that if he wished to leave he forfeited the current month's wages, and that if Levin wished him to leave he should receive the current month's wages.

By the Court: He was responsible to Levin for the tailors' work, and would have to pay for their bad work.

Saliem Edwards, a Malay tailor, said he had worked at his trade for about forty years. He worked at the Economic, and Wasserman was the head cutter. The cutter engaged tailors, dismissed them, and was responsible for them. Knew Schneider, and did not consider him a competent tailor.

Cross-examined by Mr. Innes: Did not know whether the cutter had to pay for everything that went wrong. Witness, however, was always paid; his work was all right.

Re-examined by Mr. Sheil: Was not paid until Wasserman passed his work.

Abdol Abraham, a Malay, said he had been a tailor for twenty-five years. Did not consider Schneider a good tailor, and had heard Wasserman complain of him. The cutter was the "baas" of the tailors.

This closed the plaintiff's case.

Mr. Benjamin Levin, the defendant, said he carried on business under the style of the Economic Outfitting Store in Plein-street. It was witness's own business. Plaintiff did his work well and he was by no means anxious to get rid of him. He started this tailoring business on the 1st July. Schneider was a jobber paid by the week. Schneider was one of the best tailors in the town. He was introduced by Wasserman himself. Witness paid all the wages. He dismissed the apprentice boy for concealing the fact that some trousers pressed by him were burned, and he stopped the apprentice's wages for the current week. Wasserman and witness disagreed about the apprentice and Schneider. Witness told Wasserman he would take all the responsibility of Schneider's work, but Wasserman was still obstinate and would not give Schneider work. All the employés knew there was something wrong. He ultimately, on 28th August, told Wasserman that he was about to give him a letter, in which he would state that unless he gave Schneider work by eleven o'clock he would have to dismiss Wasserman. He also told him he would be responsible for Schneider's work. Then the letter was given to Wasserman. Subsequently he dismissed plaintiff for not carrying out his orders.

Cross-examined by Mr. Sheil: Witness was not a practical tailor. The head cutter's duty would be to bring the incompetency of a weekly jobber to the notice of the master. The extent of Wasserman's responsibility was that he would have to draw witness's attention to any incompetency. He would not hold Wasserman liable to pay for it. If witness insisted on a jobber being kept on against the cutter's wishes witness would not consider the cutter responsible. He dismissed Wasserman for disobeying instructions. He was willing to engage him under a new agreement. Wasserman suited him, and he did not want to lose him. Wasserman would not accept the new terms. Wasserman came back with the letter, and said he was willing to give Schneider work on the conditions named, but witness had named eleven o'clock, and told Wasserman he was too late.

By the Court: Schneider did a lot of work, and the burning of the trousers was the only complaint against him.

Mr. William T. Buissinné said his firm was acting for the defendant in the case. Defendant asked him to go on 27th August and see Wasserman. Witness did so, and told him he had better give Schneider work. Wasserman was very obstinate, however, and said that Schneider had insulted him, but that if he would pay the 8s., the apprentice's wages for the week, he would give him work. The upshot was that Wasserman refused to give Schneider work.

By Mr. Sheil: Wasserman seemed impressed with his responsibility. Levin in witness's presence told Wasserman he would give him two hours' leave in order that he might consult his friends.

Alfred James Jennings deposed that he was a trimmer in the employ of Mr. Levin. The men who did bad work had to pay for it. Wasserman did not pay.

Cross-examined by Mr. Sheil: Wasserman was responsible, and all the work had to go through him.

Simon Sissner deposed that he was usually called Schneider. He had been a tailor all his life. The trousers were burned by the apprentice. Wasserman demanded of him the 8s. for the apprentice. Witness said he would go to Levin about it.

Cross-examined by Mr. Sheil: He served his time in Vienna. Came to the Colony in June last for the benefit of his health. In Austria the head cutter was not responsible, and tailors only looked to the master. Work had to be submitted to Wasserman, but he did not know the extent of Wasserman's responsibility.

Christian Hendricks, a tailor at the Economic, said that Wasserman refused to give Schneider work. Witness had been a tailor for fifteen years.

By the Court: Considered Schneider to be a good workman. Always got the best work at the Economic.

Mr. Sheil was heard for the plaintiff.

Judgment was given for the defendant with costs.

The Chief Justice said: It is not necessary to hear counsel for the defendant. The law applicable to this case has been very ably and

fairly stated by Mr. Sheil. The real question in this case is whether the plaintiff did or did not refuse to obey the lawful order of his master. That he did deliberately refuse to obey an order of his master is admitted by the plaintiff. He says, however, that he refused to obey the order because the plaintiff insisted on his employing an incompetent person, and he, as the cutter, was responsible for all work issuing from the workshop, and that as the responsible person the selection of the workmen should lie with him, and it has been stated also that this is the custom of the trade both in this country and elsewhere. There seems to be considerable fairness in the reasoning that if the plaintiff was to be responsible he should have the selection of the persons to be employed, but if he refuses to employ any person it would, at all events, lie upon him to prove that the person he refused to employ was incompetent to do the work. I cannot help thinking that this question of incompetency was only an afterthought. It was not raised at all until a very late stage in the dispute. I place considerable reliance on the evidence of Mr. Buissinné, who although he is an attorney in the case has no reason to be biassed one way or the other. He was called in in a friendly manner to go to the plaintiff, and give him friendly advice, and it is very much to be regretted that the plaintiff did not accept that friendly advice. It was not the wish of the defendant to go to extremes; he was anxious to give the plaintiff an opportunity of withdrawing and coming to reasonable terms. Now, it is clear from Mr. Buissinné's evidence that the real cause of the plaintiff's annoyance was that he had been personally insulted; he had a personal grievance—purely a personal grievance, against Schneider, and it was a mere afterthought to say that Schneider was not competent. The real origin of the dispute was a mistake made by the apprentice; apparently on pressing the trousers he burnt them. It escaped his notice; in fact, they were not submitted to the plaintiff before they were sent down to Mr. Levin, who first of all threw the responsibility on the plaintiff. The plaintiff then thought that some responsibility attached to Schneider, and he therefore insisted upon protecting the apprentice, while Mr. Levin thought it his duty to dismiss him, and out of this the whole dispute arose. The plaintiff insisted on the wages of the apprentice being paid, and Mr. Levin refused to pay, whereupon the plaintiff paid the amount out of his own pocket, and then insisted on Schneider repaying him the 8s.; and it is only because Schneider refused, and because Levin supported Schneider in this refusal, that he refused any longer to employ Schneider. It is quite true that some witnesses for the plaintiff say that Schneider is an incompetent tailor, but they are men working by the "job"; while men working with Schneider in the shop say he is a competent tailor, and I am not satisfied upon the evidence that he is really incompetent. Mr. Sheil says that the fact of Schneider being employed only for repairs shows that he is incompetent, but at any rate it shows that he was competent for repairs, and if he was employed for that purpose it cannot be said that he was incompetent as a tailor. Now the interview that passed while Mr. Buissinné was present shows the real cause of the dispute. The plaintiff said that if the 8s. were paid by Schneider he would give him work; then he said that he was responsible; while in the interviews between Levin and himself he wishes the Court to believe that the whole matter hinged on the further question of his responsibility, and that Mr. Levin refused to accept any responsibility himself, but threw it upon himself, the plaintiff. Now the very fact that the case has been brought to Court proves the wisdom of Mr. Levin's letter. On the evidence it seems that his object in writing the letter was to prevent any dispute, and Mr. Levin wrote stating that the plaintiff was to employ Schneider, and gave him ample time to decide whether he would employ Schneider or not. It is said that the plaintiff could not read, but there was ample time between his receiving the letter and the hour fixed for him to consult either those in the shop or friends outside. But Mr. Levin goes further, and says that on that very morning he told the plaintiff he was going to write him a letter, and told him the terms of that letter, that he (Levin) would be responsible for the work done by Schneider if the plaintiff would employ him. Now, in my opinion that was a perfectly reasonable order. The defendant believed Schneider to be competent, and there is no reason for the Court to believe that he was incompetent. The defendant took the whole responsibility of his work on himself, and notwithstanding this indulgence the plaintiff still refused to employ the man. It seems to be a deliberate refusal on the part of the servant to obey a lawful and reasonable order, and under these circumstances it appears to me that the defendant had no option but to part company with a servant who deliberately refused to obey what appears to be a most reasonable order. Then reliance is placed on what took place subsequently. Well, it amounted to no more than this, that Mr. Levin was anxious to have the plaintiff in his service, and he did not want a repetition of what had already

occurred, but wished to have a man who was really a servant, and he wished to be in the position for the future to part with the plaintiff should it become necessary. Accordingly he was very reasonable, and offered the plaintiff increased wages from £12 per month to £20, with leave on either side to terminate the engagement without notice. Well, the plaintiff refused to accept that reasonable offer, and he must now suffer the consequences. Judgment must be for the defendant with costs.

Mr. Justice Buchanan: I concur. There was want of reasonableness on the part of plaintiff; not on the part of the defendant.

Mr. Justice Upington: I am also of that opinion.

[Plaintiff's Attorney, J. C. de Korte; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

ADMISSION.

Ex parte VAN NOORDEN.

On the motion of Mr. Juta, Q.C., Mr. Van Noorden was duly sworn in as an attorney and notary of the Supreme Court.

GREEN V. BRADFORD AND ANOTHER. BRADFORD V. GREEN AND FITZGERALD. 1894. Dec. 4th.

These applications were heard together. The first was for an order varying an order made in chambers on 30th October last.

Mr. Watermeyer for applicant.

Mr. Benjamin for respondent.

The Court held that the application was unnecessary and it was refused with costs.

The second application was to make absolute a rule *nisi* allowing Bradford to sue *in forma pauperis* in an action about to be instituted by him against the respondents.

The original petition, upon which the rule *nisi* was granted, was based on an affidavit of Bradford, Van der Walt and another, the last two certifying that Bradford was not worth £10.

For the respondents an affidavit by Van der Walt was now read in which he withdrew his first affidavit, and alleged *inter alia* that the same was made in error and under the persuasion of one Du Toit, the agent for the applicant.

Affidavits from Fitzgerald were also read showing that Bradford had sufficient means. Replying affidavits from Bradford and wife and also two additional affidavits were read testifying to Bradford's poverty.

Mr. Benjamin for applicant.

Mr. Watermeyer for respondent.

The rule was discharged with costs.

[Attorneys for Green, Messrs. Fairbridge & Arderne; Attorneys for Bradford, Messrs. Van Zyl & Buissinné.

QUIN V. PILKINGTON AND DIVINE. 1894. Dec. 4th.

Executor—Attorney and client—Costs *de bonis propriis.*

An executor has authority to employ an attorney at law to conduct lawsuits on behalf of the estate, and an attorney who is bona fide *employed for that purpose and conducts the suit honestly is entitled to recover his lawful fees and disbursements from the estate.*

An order in such lawsuit that the executor shall pay the costs de bonis propriis *by reason of his personal neglect or misconduct does not* per se *deprive the attorney of his right to recover his fees and disbursements from the estate.*

This was the return day of a rule *nisi* granted by Mr. Justice Upington in Chambers on the 27th October last calling upon the respondents (the first named in his capacity as executor of the estate of Mary Anne Quin) to show cause why a certain judgment obtained in the Supreme Court by the second-named respondent, George Pilkington, against the executor on the 12th October, 1894, should not be reduced by the sum of £165 17s. 0d., the amount of the costs incurred in a certain action in the Eastern Districts Court and which costs the executor was ordered to pay *de bonis propriis*, or why Pilkington should not be ordered to stay execution on his judgment against the estate to the extent of the aforesaid amount.

The petition upon which the rule was granted alleged that the petitioner was the youngest son of John and Mary Anne Quin, both deceased.

That in the will and testament of his mother the petitioner, who was a minor at the date of her decease, was bequeathed a certain house and grounds, together with furniture and movables.

That on the death of Mrs. Quin, Divine, her duly appointed executor, took possession of the house, grounds and effects in Henrietta-street, Fort Beaufort, and although frequently requested, refused to resign possession and occupation and deliver to the petitioner his just dues and inheritances under his mother's will,

That in order to obtain possession of his rightful inheritance the petitioner was compelled to bring an action against Divine, the executor, in the Eastern Districts Court where judgment was given in favour of the petitioner, Divine being ordered to pay the costs of the suit *de bonis propriis*.

That the costs mentioned, as set forth in the schedule annexed to the petition (amounting in all to £922 7s. 4d.) were included and allowed to be charged against Mrs. Quin's estate by Divine, the executor, he knowing perfectly well at the time, as also did his attorney (Pilkington), that he had been adjudged to pay these costs out of his own private pocket and estate.

That the Supreme Court gave judgment in the matter of *Pilkington* v. *Divine* (Executor Estate M. A. Quin) on the 12th October, 1894, for £743 7s. 2d. with interest in favour of the plaintiff (who acted as attorney on behalf of Divine in the action brought by the petitioner), and that of this amount the sum of £165 12s. 9d were costs incurred by Divine in his defence to petitioner's action.

The petitioner alleged that he had been informed and verily believed that Divine purposely and with intent allowed the judgment of the Supreme Court to be given by default in the case brought against him by Pilkington (his attorney), with the object of relieving his own private pocket and estate at the expense of his trust, and to the loss and detriment of the petitioner and the minor heirs in the estate of the late Mary Anne Quin, who will suffer great loss thereby.

That although Divine has property exceeding in value the amount of costs £165 12s. 9d., no offer has been made by him to pay that sum, nor has his then attorney (Pilkington) pressed him for that amount, it being, the petitioner alleged he was informed, a mutual understanding that the heirs in the estate should be made to suffer.

That in doing this Divine had wilfully abused his trust, and that it was the intention of the petitioner to apply to the Court for Divine's removal as executor, on account of his gross incompetence and wilful neglect of trust, through which the heirs in the estate and particularly the petitioner, who had been called upon to pay some large amounts of money in obtaining his rights, were plunged into great cost almost to their absolute ruin.

That if the provisional judgment of the Supreme Court for the sum of £743 7s. 2d. with interest were confirmed, the petitioner would be deprived of all opportunity of contesting the right of Pilkington and Divine to charge the sum of £165 12s. 9d. and other charges in the account laid before the Court of the estate of the late M. A. Quin.

The prayer was that the Court would be pleased to strike off from the bill of costs of £743 7s. 2d. the sum of £165 12s. 9d. mentioned above, or to grant a temporary extension of the time allowed by the Court in awarding judgment in the matter *Pilkington* v. *Divine* q.q., estate M. A. Quin, until such time as an action could be brought by the petitioner and the other heirs in the estate to have that sum expunged from the bill of costs on which the Court had given provisional judgment, or to grant the petitioner such further or other relief as to the Court might seem meet, with costs.

The respondents filed answering affidavits. Pilkington denied that there was any understanding between himself and Divine when he sued the latter for the amount of his costs. He further denied that he could have recovered the £165 12s. 9d. from Divine personally as the latter was without means; in this he was corroborated by Divine, who stated that his only sources of income were £40 to £60 a year, derived from property in which he had merely a life interest under the mutual will of himself and his deceased wife, and 5s. a day from employment in the Fort Beaufort public works.

Mr. Rose-Innes, Q.C., in support of the application, said that there was no proof of collusion between Pilkington and Divine further than the applicant's statement which was denied by the respondents.

Mr. Juta, Q.C., for the respondents.

The Court refused the application.

The Chief Justice said: This has certainly been a most unfortunate estate. It has been involved in litigation since the testator's death, and litigation is not yet at an end. The applicant, who is one of the heirs, is not to be blamed for applying for the rule, seeing that the order of the Eastern Districts Court in the action there brought against the executor, that such executor should pay costs *de bonis propriis*, was not brought to the notice of this Court in the action subsequently brought by Pilkington against the executor for his costs. But the Eastern Districts Court could not have intended to deprive Pilkington of his right to recover his costs from the estate on behalf of which he had been employed. It is not alleged that the employment was not made *bona fide*, and the allegation that there was subsequent collusion between Pilkington and the executor is admitted by Mr. Innes not to be supported by sufficient evidence. From the account upon which this Court has given judgment it appears that a large amount is owing by the estate to the

applicant not only for his own professional fees, but for considerable advances made by him on behalf of the estate. That amount he was entitled to recover from the estate whatever obligation there might be upon the executor, as between him and the heirs, to hold the estate harmless for any costs incurred in the action in the Eastern Districts Court. The real question is whether an attorney who has been *bona fide* employed by an executor to conduct a lawsuit and has conducted that suit honestly is entitled to recover his lawful fees and disbursements from the estate on behalf of which he has been employed. There can be no doubt as to an executor's authority to employ an attorney and the question therefore admits of only one answer. There exists no ground for interfering with the judgment given in favour of Pilkington, and the rule must be discharged with cost, out of the estate, but with leave to the respondents to recover from the applicant such of their own costs as they may be unable to obtain out of the estate.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

REGINA V. SIMONHOFF. { 1894. Dec. 6th.

Theft—Ostrich feathers—Evidence sufficient to justify conviction.

This matter came before the Court on notice given to the Attorney-General that the case had been set down for argument on review from the finding of the Resident Magistrate of Robertson, in the Periodical Court held at Montagu. The reasons of the review being gross irregularity:

(*a*) In that Simonhoff was summoned for contravention of Act 35 of 1893, section 7, which section creates no offence.

(*b*) In that there was no evidence of the crime of theft. The summons alleged that the accused did on or about the 16th November, 1894, and at Montagu, contravene section 7, Act 35 of 1893, by wrongfully and unlawfully stealing produce, to wit, a quantity of ostrich feathers, the property, or in the lawful possession, of Jacobus Daniel du Toit, a farmer, residing at Montagu.

The prisoner was found guilty, and sentenced to six weeks' imprisonment.

No notice of appeal was given under Act 21 of 1876, section 4. The record was forwarded in the ordinary course to the Registrar of the Supreme Court under Act 20 of 1856, section 47, and was laid before a Judge in Chambers for his certificate.

Mr. Giddy, for the Crown, pointed out that as this was not an appeal, nor a review under the 190th Rule of Court, the onus of showing that there had been such irregularity in the Court as was contemplated by Ordinance 40 of 1828, section 5, lay on the prisoner, and this should be shown before the record could be read.

The Court allowed the record to be read as though the case had come before a Judge in Chambers. This being done,

The Chief Justice said: In every case of appeal from the decision of a magistrate notice should be given within four days from the conviction, and unless this notice is given the prisoner cannot as of right appeal to the Supreme Court. Of course the right of the Supreme Court to request counsel to argue the case on behalf of the prisoner remains, under the 48th section of Act 20 of 1856. [His lordship read the section and continued.] So that if the case is at all doubtful the Court would always exercise this power, and request counsel conversant with the case to argue it on behalf of the prisoner; so that whether the Attorney-General agrees or not the Court has the power to hear Mr. Juta.

The evidence for the prosecution went to show that on the day of the alleged theft the prisoner was plucking some of his own ostriches amongst which a female bird belonging to Du Toit, and marked with Du Toit's mark "No. 5," was found with its wing feathers recently plucked. The feathers were found in the prisoner's bag.

For the defence it was suggested that Du Toit, who had a grudge against the prisoner, had himself put the feathers in the bag.

Mr. Juta, Q.C., was heard on behalf of the prisoner.

The conviction was sustained.

The Chief Justice said: The only question in this case is whether there was sufficient evidence before the Magistrate to justify the conviction. It is clear to my mind that the prosecutor's bird was plucked on the day in question, and that the feathers taken from the bird were found in the prisoner's bag. Now, it is said that there was either a mistake, or that the feathers were placed there by the prosecutor. Well, as to the latter alternative, it would be such a diabolical plot that one would really like to have some evidence to justify the suggestion that the prosecutor put the feathers there. It is true that he had a grudge against the prisoner, and was glad when an opportunity came when he could prosecute the prisoner, whom he believed to be guilty of an offence; but it does not follow that he placed the feathers in the bag for the purpose of proving that the prisoner

took them. Then after the prisoner had been convicted, the prosecutor requested the Magistrate to deal as leniently as possible with him, showing that he could not have had such a grudge against the prisoner as has been suggested. Then it is said it was a mistake, but if it was a mistake, the conduct of the prisoner was inconsistent with that theory. He first of all denied that the feathers were in the bag at all. Well, he must have known that he plucked that particular bird. If he had made a mistake the first thing he would have said would have been, "Well, I have plucked a bird; look and see if the feathers are there." This bird had a mark which was known to the prisoner. "No. 5" was marked in conspicuous letters upon the bird, and I do not think a man plucking the bird could have failed to see the mark. If the Magistrate had acquitted the prisoner I should not have found fault with his verdict, but as he has convicted the prisoner, I am unable to say that there is no evidence to justify the conviction, and the appeal must be dismissed. As to the other grounds, there is not much to say upon them. We have already settled the point that the summons is in proper form, inasmuch as the prisoner is charged with theft, and the provisions of the Act under which the prisoner was charged were complied with.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Findlay & Tait.]

STEGMANN v. BOARD OF EXECUTORS, N.O. { 1894. Dec. 6th.

Will—Children—Grandchildren—Representation—*Jus accrescendi*—Life interest—*Fidei-commissum.*

A testatrix appointed her only child, a daughter, as sole heir subject to a fidei-commissum *and directed that after the death of the daughter and her husband, all the children of her said daughter were to receive the interest on the capital inheritance in equal shares,* "whilst only after the death of her (the testatrix's) grandchildren the said capital inheritance shall respectively in proportion to the number of the testatrix's grandchildren and in so far as each one's share in it is concerned devolve as free and unincumbered property upon her great grandchildren."

Held, *that on the death of each grandchild his or her children step into the place of such grand-child and are entitled to the capital of the share on which such grandchild has enjoyed the interest.*

This was a special case stated for the decision of the Court in the following terms:

The plaintiff resides at Newlands, and is a son of the late Johannes Augustus Stegmann, and a great-grandson of the late Emerentia Gerharda Zibee (born De Jong).

The defendants are the administrators of the funds paid them by the executors testamentary of the late Emerentia Gerharda Zibee.

In the year 1847 the said Emerentia Gerharda Zibee died, leaving a will, by which she appointed as sole heir of her entire property her daughter, Anna Maria Zibee, upon condition that the property thus bequeathed should be burthened with *fidei-commissum*, that the said Anna Maria Zibee during the term of her natural life should only receive and enjoy the interest of the capital inheritance so bequeathed. After the death of the said Anna Maria Zibee, who, in her lifetime, had been twice married, the interest on the said capital inheritance should be received and enjoyed by the testatrix's son-in-law (Pieter Jacobus Sandenberg), the second husband of the said Anna Maria Zibee. That on the death of the said Pieter Jacobus Sandenberg all the children of her daughter, born of both marriages of the said Anna Maria Zibee, were to receive the interest on the said capital inheritance in equal shares. "Whilst only after the death of her (the testatrix's) aforementioned grandchildren (or her daughter's children) the said capital inheritance shall respectively in proportion to the number of the testatrix's grandchildren, and in so far as each one's share in it is concerned, devolve as free and unincumbered property upon the grandchildren of her (the testatrix's) daughter or rather upon her (the testatrix's) great-grandchildren, whom she now for them herewith substitutes as her heirs." As will more fully appear from the will of the said Emerentia Gerharda de Jong, widow of Bernhardus Zibee, to which the parties crave leave to refer. The testatrix's daughter, Anna Maria Sandenberg, died on the 12th day of December, 1855. She had issue five sons, of whom George Frederick Stegmann died on 24th day of September, 1875, leaving issue. Dirk Johannes Stegmann died on May 27, 1855, leaving issue. The plaintiff's father, Johannes Augustus Stegmann, died on or about August 17, 1894, leaving as his lawful issue nine children and Albertus Stegmann and Bernhardus Zibee Stegmann are still alive, and each has issue. There was no issue of the marriage of the

said Pieter Jacobus Sandenberg and his said wife, and the said Sandenberg died on March 7, 1870. The total sum burdened by the testatrix with *fidei-commissum* as aforesaid is £7,656 13s. 6d., and after allowing for succession duty, one-fifth share of the said sum amounts to £1,516 0s. 4d. The plaintiff contends that in terms of the will of the said Emerentia Gerharda Zibee (born De Jong) he is now entitled to receive one-ninth part of the said sum of £1,516 0s. 4d.

The defendants contend:

(*a*) That the said one-fifth share of the said inheritance should, in terms of the said will, be equally distributed among all the great-grandchildren who were alive at the death of the said Johannes Augustus Stegmann; or,

(*b*) That the interest on the entailed capital should be paid to the grandchildren of the testatrix as directed by the will so long as any of them survive, and that at the death of all the grandchildren the said capital should be divided among all the grandchildren then living, either in equal shares, or *per stirpes;* that is, one-fifth among the children of each grandchild.

Mr. Graham for the plaintiff.

Mr. Rose-Innes, Q.C., for the defendants.

Judgment was given in favour of the plaintiff's contention.

The Chief Justice said: The testatrix took special care to provide that upon the death of her daughter and her then son-in-law all her grandchildren should receive the interest on the capital inheritance in equal shares. The will then proceeds thus: "Whilst only after the death of her grandchildren the said capital inheritance shall respectively in proportion to the number of the testatrix's grandchildren, and in so far as each one's share in it is concerned, devolve as free and unincumbered property upon her great-grandchildren." The provisions of the will are somewhat involved but the meaning of the testatrix is reasonably clear. Having provided for perfect equality among her grandchildren, who were all children by her only daughter, she proceeded to direct that as each grandchild died his or her child should step into her place as heirs by representation. The use of the expression "respectively in proportion to the number of the testatrix's grandchildren and in so far as each one's share in it is concerned" negatives the defendants' contention that the great-grandchildren were intended to share in the inheritance *per capita* and not *per stirpes*, and it also negatives the contention that the *jus accrescendi* was intended to apply to the life interest of the grandchildren. The great-grandchildren are entitled to represent their deceased parents in such a manner that, as each parent dies, his or her proportionate share of the inheritance shall devolve upon his or her children. The plaintiff is one of nine children of a grandson of the testatrix. The plaintiff's father has recently died and the plaintiff contends that he is entitled to one-ninth portion of the share in respect of which his father enjoyed the interest. Judgment must be given in accordance with this contention and the costs must come out of the estate.

Their lordships concurred.

[Plaintiff's Attorney, C. C. de Villiers; Defendants' Attorney, J. H. Hofmeyr.]

---

*REGINA v. MARGOLIUS. { 1894. Dec. 7th.

Partners—Crime—Fraudulent contracting of debt—Special entry—Illegality of conviction—Criminal appeal.

A. *and* B., *being partners, were convicted by a jury of fraudulent insolvency in having fraudulently contracted certain debts before their insolvency.*

The debts were contracted by B. *in Cape Town at a time when* A. *was at Beaufort West, and beyond the fact that the prisoners were partners, there was not, in the opinion of the majority of the Court, any evidence of* A.'s *participation in or knowledge of* B.'s *fraud.*

No application was made to the presiding Judge for leave to make a special entry of the illegality of the conviction, but leave was afterwards given by the Supreme Court with the consent of the presiding Judge.

Held, *that in the absence of any evidence connecting* A. *with* B.'s *fraud, the conviction of* A. *was illegal.*

This was an appeal from a sentence upon Julius Margolius at the last Circuit Court held at Beaufort West. The appellant and his partner, Samuel Lewis, were indicted for the crime of fraudulent insolvency in contravention of section 70, Ordinance 6 of 1843.

There were six counts in the indictment.

The first count charged the prisoners with having on the 4th January, 1894, and at Cape Town, wrongfully, unlawfully, and fraudulently

---

* *Vide Supra* p. 359.

contracted a debt of £94 9s. 10d. to J. G. Steytler & Co., well knowing at the time that their (the prisoners') estate was insolvent.

The second count charged them on the same day (January 4, 1894) with having fraudulently contracted a debt of £58 16s. to Henry Richold, of Cape Town.

The fourth count charged them with having on the same date fraudulently contracted a debt of £224 to John Garlick, of Cape Town.

The fifth count charged them with having on the same date fraudulently contracted a debt of £140 to Mossop & Garland, and

The sixth count charged them with having on February 5, 1894, and at Rietfontein, in the district of Beaufort West, wrongfully, unlawfully, and fraudulently embezzled, concealed, and removed part of their estate and effects, to the value of £824 11s. 6d., with intent to defraud their creditors.

The prisoners were found guilty on the first, second, fourth, and fifth counts, the third count was withdrawn, and the prisoners were acquitted on the sixth count.

The evidence went to show that the debts referred to in the indictment were contracted by Lewis in Cape Town owing to fraudulent representations, his partner, Margolius, being at the time in Beaufort West. There was no evidence, however, to connect Margolius with the fraudulent representations made by Lewis, nor was there any evidence to show that Margolius had any knowledge that the fraudulent representations had been or would be made.

The prisoners were each sentenced to two years' imprisonment with hard labour.

From this sentence Margolius now appealed, on the grounds that there was no evidence to justify his conviction.

Mr. Graham and Mr. Watermeyer for the appellant.

Mr. Giddy for the Crown.

The Court (Mr. Justice Upington dissenting) quashed the conviction.

The Chief Justice said: The prisoners Margolius and Lewis were tried at the last Circuit Court for Beaufort West for the crime of fraudulent insolvency in contravention of the 20th section of Ordinance 6 of 1843. The first five counts of the indictment charged them with having fraudulently contracted certain debts therein specified, and the sixth count charged them with having fraudulently embezzled, concealed, or removed part of their effects to the value of ten pounds sterling or upwards. They appear to have had a patient trial and they were convicted on the first, second, fourth, and fifth counts, but acquitted on the third and sixth. As to the sixth count, evidence was given which would have justified the conviction of Margolius, but he was acquitted, and we are not entitled to assume that he was guilty on that count. The learned judge, who presided, left the whole case to the jury and, as there was evidence against Margolius on the sixth count, this appears to me to have been the safe and proper course. If, after conviction on four counts and acquittal on two, the counsel for Margolius had applied for leave to make special entry on the record to the effect that the conviction was illegal on the ground that there was no evidence to connect him with the offence, I have no doubt leave would have been granted. No such application was then made, but on behalf of the appellant, Margolius, an application was made to this Court a few days ago and, with the consent of the learned judge who presided, leave was given to make the entry as if an immediate application had been made in the Court below. The question now to be determined is whether there was any evidence to justify the conviction of the appellant. I have listened attentively to the evidence read, and if there had been any proof whatever of the appellant's participation in Lewis's fraudulent contracting of debts on behalf of the partnership I should have refused to disturb the verdict. The men were partners in trade and it would be unreasonable to require the same strictness of proof that the appellant was a party to Lewis's fraud as would have been necessary if they had not been partners. The mere fact of partnership, however, is not sufficient proof. It is an element of proof but it should certainly have been supplemented by some evidence of the appellant's participation in or knowledge of his partner's dealings with the creditors of the firm in Cape Town. There is a total lack of such evidence; on the contrary, the evidence rather tends to show that what was done by Lewis was done on his own responsibility, and by reason of information received by him after he had last seen his partner at Beaufort West. It has been urged on behalf of the prosecution that the facility with which further credit was obtained by Lewis ought to have convinced the appellant, before he accepted the goods at Beaufort, that fraud had been perpetrated by his partner upon the Cape Town merchants. This is but a weak argument when we consider the well-known facility with which credit may be obtained in Cape Town even by comparative strangers. It would have been so easy for Lewis to obtain further credit by honest means that it seems a very unfair inference that his partner must have known that dishonest means were being resorted to. In the absence of any proof of such knowledge

I am of opinion that the verdict cannot stand and that the conviction must be quashed.

Mr. Justice Buchanan: This is a case that requires very careful consideration, and I think it a sound principle that where a case is submitted to a jury the verdict of the jury, given on the evidence, ought to be held conclusive. As his lordship the Chief Justice has said, there was ample evidence to put before the jury on the sixth count of the indictment as it stood, and I also certainly hold that if there had been a conviction on the sixth count, this Court would not have quashed the conviction; but we have now to look at the case in the light of the jury returning a verdict of not guilty on this sixth count. As to the other counts of the indictment, there is this second count on which Margolius is being punished. Now Margolius could only be guilty if there was guilty knowledge of what had been done by his partner. With regard to the evidence of Richold, it was only after Lewis's arrival in Cape Town that the credit was arranged, and apparently Richold's name was never mentioned between the two prisoners. The jury have convicted Margolius of participating in false pretences by which Lewis obtained goods from Richold, whereas there is no evidence at all to show that he knew of these false pretences. Applying the same reasoning to the other counts I think there is no evidence to hold that Margolius was cognisant of his partner's false pretences in regard to the other creditors. It requires a strong case to depart from the finding of a jury, but in the absence of evidence that Margolius in Beaufort was aware of his partner in Cape Town obtaining credit by false pretences I concur that the conviction must be quashed.

Mr. Justice Upington: I simply say that I am quite unable to agree with the judgment.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

STEPHAN BROTHERS v. SYBEL AND FIVE OTHERS. { 1894. Dec. 7th

In this matter Sybel and five other fishermen of Cape Town were brought before the Resident Magistrate of Malmesbury on the 6th inst., on a warrant charging them with a contravention of Act 18 of 1873, section 7, paragraph 2.

It appeared from the warrant that the alleged contravention took place on 22nd July last, and that the warrant was only issued on 8th November last, the accused being arrested in Cape Town on 4th December, 1894.

One of the accused (Bokkenpoel) was arrested on 2nd December, 1894, by warrant issued on the 12th November, 1894.

The Resident Magistrate of Malmesbury declined to set aside the arrests, and ordered the accused to be forwarded to St. Helena Bay on the 8th December inst., for trial at the next Periodical Court to be held there.

St. Helena Bay is more than 100 miles from Malmesbury, and it was alleged on affidavit that it would, therefore, entail great hardship and expense upon the accused to be properly defended there, the defendants' residence being much nearer to Malmesbury than St. Helena Bay.

The accused gave notice of appeal, and intend prosecuting same on 12th January, 1895.

The Resident Magistrate in ordering the accused to be sent to St. Helena Bay offered to release them on their finding bail to the amount of £10 each, although the highest penalty for the alleged offence is only £2.

Under these circumstances the accused appealed for relief.

The prayer was:

(*a*) That the Resident Magistrate of Malmesbury may be restrained from forwarding the accused to St. Helena Bay.

(*b*) To reduce the bail to a more reasonable amount pending the result of the appeal.

(*c*) To order the Resident Magistrate to forward the records to the Registrar of the Supreme Court.

(*d*) Such further relief as may seem meet.

Mr. Graham appeared for the accused.

The Court dismissed the warrant.

The Chief Justice said: It is clear that the warrant is informal. The warrant of apprehension states that there are reasonable grounds for suspicion against the applicants that they did commit the crime of contravening section 7 of the Act 18 of 1873. Before the contravention of that section they could not be apprehended unless there were reasonable grounds for believing that they would not appear on the day for which they were summoned; but there appears to be no statement to that effect. If the present applicants had been charged under sub-section 6 of section 4 of the Act of 1873, then it would not have been necessary to state that there were reasonable grounds for believing that they would fail to appear, and objection could not have been raised; but the section under which they were apprehended requires reasonable ground for believing that they will not appear, and for these reasons I am of opinion that the warrant must be discharged.

Their lordships concurred.

[Applicant's Attorney. D. Tennant, jun.]

Ex parte MCLEROTH. { 1894. Dec. 7th.

Mr. Maskew moved on behalf of Mrs. S. McLeroth, of Caledon, who was married in community of property, and whose husband is now an inmate of the Valkenburg Asylum, for leave to purchase for £500 from the estate of her father the property now occupied by her, and also for leave to mortgage the property for £700.

The Court granted the order as prayed.

PROVISIONAL ROLL.

HILL BROS. V. REICH. { 1894. Dec. 12th.

Mr. Sheil moved for provisional sentence on the "gross" of a notarial bond for £248 18s. 9d., with interest at 6 per cent. from 9th January, 1894. The bond had become due by non-payment of the capital sum and interest.

Counsel also moved for provisional sentence on two bills of exchange, the first dated February 19, 1894, for £97 0s. 10d. at 120 days after sight and accepted by the defendant, payable at the Standard Bank, Burghersdorp, on 14th July, 1894, and the second dated 31st March, 1894, for £25 12s., also at 120 days after sight and accepted by the defendant, payable on 25th August, 1894, at the Standard Bank, Burghersdorp, with interest from the due dates.

Mr. Juta, Q.C., appeared for the defendant and submitted that the plaintiffs being a firm domiciled in England, and having no property in this country, were bound to give security.

The Court ordered the plaintiffs to find security, and postponed the hearing of the case on the merits until security had been given.

LONGWORTH AND CO. V. RICHARDS.

Mr. Shippard applied for the final adjudication of the defendant's estate.

Order granted.

VAN DER WESTHUIZEN V. BADENHORST.

Mr. Watermeyer moved for the final adjudication of the defendant's estate.

Granted.

JURGENS V. DE VILLIERS.

Mr. Benjamin applied for provisional sentence for the sums of £99 13s. 3d. on a promissory note and £22 9s. 11d. for goods sold and delivered.

Provisional sentence given on the promissory note and judgment for the remaining claim.

WENTZEL AND SCHLESWIG V. GADOW.

Mr. Benjamin applied for provisional sentence for the sum of £52 10s. with interest.

Granted.

TOWN COUNCIL V. MURISON.

Mr. Spence moved for judgment for the sum of £52, less £30 for taxes.

Granted.

HILLIARD V. DYMOTT.

Mr, Benjamin applied for judgment for the sum of £48 18s. 4d., with interest at the rate of 6 per cent. per annum.

Order granted.

VAN DER BYL AND CO. V. DU PLESSIS.

Mr Jones moved for judgment for the sum of £43 10s. 2d., goods sold and delivered, less the sum of £5.

Order granted.

REHABILITATIONS.

Mr. Currey moved for the rehabilitation of Cornelius Möll.

Granted.

Mr. Watermeyer moved for the rehabilitation of William Rowland Hill.

Order granted.

GENERAL MOTIONS.

THE PETITION OF CAROLINA F. HAYWARD.

Mr. Tredgold moved for leave to sue by edictal citation in an action by the applicant against her husband, who left the Colony in June, 1893, but whose address is unknown, for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

Leave granted to sue by edictal citation, personal service, failing which one publication in the "Manchester Guardian." Process to be returnable on the last day of the February term.

IN THE MATTER OF THE WORCESTER COMMERCIAL BANK.

Mr. Benjamin applied for the fixing of a date within which all claims are to be filed against the said bank, which is under voluntary liquidation, or in the alternative for an order placing the bank under operation of the winding-up clauses of the Companies Act.

The Court made the following order:

1. That the said company be wound up.

2. That Messrs. Johannes Daniel Hugo, Paul Bosman, and Frederick Lindenberg be appointed official liquidators, with the powers mentioned in the 149th section of the Companies Act of 1892.

3. All claims to be filed on or before the 28th day of February, 1895.

4. Costs of this application to come out of the assets of the company.

MILES V. CLARK.

Mr. McLachlan moved to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against respondent for the recovery of damages for breach of contract.

Mr. Juta, Q.C., for the respondent.

The Court discharged the rule.

COOK BROS. V. COLONIAL GOVERNMENT. { 1894. Dec. 12th.

Evidence—Commission—Probable refusal of witnesses to attend at trial—Native chief.

Where in an application for a commission to take the evidence of a native chief and others of his tribe in an action against the Government, it was alleged that the witnesses would probably refuse to leave their country and come to Cape Town to give evidence at the trial.

The Court *made no order, on the undertaking of the Attorney-General that the Government would do all it could to secure the attendance of the witnesses at the trial, and if necessary compel them to attend.*

This was an application on notice that the Court would be moved for the appointment of a commissioner to take the evidence of Sigcau, late Paramount Chief of the Pondos, and other witnesses residing in Pondoland, Griqualand East, and elsewhere.

The main ground relied upon in the petition for the issue of the commission was the enormous expense the plaintiffs would be put to in bringing these witnesses to Cape Town.

The application was opposed by the Government, on the grounds *inter alia* that it was highly desirable in the public interest that all the issues raised in the case should be discussed and all the evidence proposed to be submitted should be led before the Supreme Court. so that *inter alia* the credibility of the witnesses might be properly tested.

The petitioners in their replying affidavit alleged that the many defences raised by the defendant would involve the necessity of examining some thirty witnesses, many of whom are uncivilised Kafirs, who, while they could be prevailed upon to attend before a commissioner of this Court in Pondoland, or some other place near their habitation, would not attend to give their evidence in the Supreme Court, in a part of Africa they have never been in, or become acquainted with, and that Sicgau himself could not be prevailed upon, nor would he obey a subpœna to attend in Cape Town, although a few of the native witnesses who have received some education might.

Mr. Solomon, Q.C., Mr. Sheil, and Mr. Webber appeared for the petitioners.

The Attorney-General, Mr. Juta, Q.C., and Mr. Giddy for the Government.

The Court made no order.

The Chief Justice said: The ground upon which this application, in the first instance, was based was that the expense would be enormous to bring Sigcau and the other witnesses from Pondoland to give evidence in the Supreme Court. The answer to that appears to be that the expense would be quite as great to hold a commission in Pondoland. and to send counsel and attorneys engaged in the case to Pondoland for the purpose of examining and cross-examining the witnesses. But in the replying affidavit the plaintiffs put forward another ground; that is, that Sigcau and other native witnesses might refuse, or probably would refuse, to come to Cape Town and give their evidence here. Well. on behalf of the Colonial Government, the Attorney-General has undertaken to give every facility to enable these witnesses to come to Cape Town. The Government will use all its efforts to induce them to come, and if necessary, compel them to come; and moreover, the Attorney-General has undertaken that if the witnesses do not appear at the trial, the Government will not press the matter against the plaintiff, but will then consent to time being allowed to take the evidence on commission. Under these circumstances, and as the Court will bear in mind this undertaking on the part of the Attorney-General, no order will be made. The question of the costs can remain over until the hearing of the action, when we shall be in a better position to know whether the petition really was necessary or not.

The Attorney-General: I take it that the plaintiffs will submit in due time a list of the witnesses who refuse to attend the trial.

The Chief Justice: That would be only fair.

[Plaintiffs' Attorneys, Tredgold & Co.; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

VETTER V. BYDEL AND UYS'S ASSIGNEE.

Mr. Buchanan applied on behalf of the defendant for leave to sign judgment with costs against the plaintiff, by reason of his failure to proceed with his action within the period prescribed by the rules of Court.

Order granted.

IN THE INSOLVENT ESTATE OF JAN T. PRINSLOO.

Mr. Buchanan applied for a further period of six months to the sole trustee within which to file his liquidation account of the said estate, he having been unable up to the present to dispose of the landed property belonging thereto.

Order granted.

IN THE ESTATE OF THE LATE ELIJAH WIGGILL.

Mr. Sheil applied for leave to the widow and executrix to raise a sum of money on mortgage of the farm Aloe Grove, the property of the estate, in the district of Queen's Town, for the purpose of discharging certain debts.

Order granted.

THE PETITION OF LEWIS LEVENSON.

Mr. Jones applied for a rule *nisi* calling upon all persons interested in certain premises situated at the corner of Bree and Church-streets, Cape Town, to show cause why the same should not be transferred out of the name of Coenraad Eb, as per deed of transfer dated the 7th January, 1772. into that of petitioner, who purchased the whole building from the insolvent estate of Alexander Maderose.

The Court made no order.

IN THE MATTER OF THE MINOR LOURENS J. C. ZIETSMAN.

Mr. Buchanan moved for authority to the tutor testamentary of the said minor to represent him, and execute all necessary documents in connection with the partition of certain landed property in the district of Humansdorp, of which a defined portion has been awarded to the minor by the arbitrators appointed for the purpose.

Order granted.

IN THE MATTER OF THE ANTE-NUPTIAL CONTRACT OF THOMAS O'BRIEN DRURY AND ELSIE D. M. BURGER.

Mr. Buchanan moved for authority to the Registrar of Deeds to register the ante-nuptial contract entered into between the said parties, notwithstanding that the period within which it should be lodged has expired.

Order granted.

IN THE MATTER OF THE LIFE POLICY OF THOMAS F. W. BARRY.

Mr. Juta moved for the sanction of the Court to the resignation by Michael Barry of certain obligation entered into by him with regard to the said life policy, ceded to him in trust for the benefit of the wife and children of the said Thomas F. W. Barry.

Order granted.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

HILL BROS. V. REICH. 1894. Dec. 13th.

Mr. Sheil moved for provisional sentence on the "gross" of a notarial bond for £248 18s. 9d., with interest at 6 per cent. from 9th January 1894. The bond had become due by non-payment of the capital sum and interest.

Counsel also moved for provisional sentence on two bills of exchange, the first dated February 19, 1894, for £97 0s. 10d. at 120 days after sight and accepted by the defendant, payable at the Standard Bank, Burghersdorp, on 14th July, 1894, and the second dated 31st March, 1894, for £25 12s., also at 120 days after sight and accepted by the defendant, payable on 25th August, 1894, at the Standard Bank, Burghersdorp, with interest from the due dates.

Mr. Juta, Q.C., appeared for the defendant and opposed provisional sentence on the grounds that the bond had been given as collateral security for the sum of £248 18s. 9d., due on a bill of exchange accepted by the defendant, and that the bill had not been tendered; further, that the interest due on the bond on the 30th June last had been tendered to the plaintiff's agent and refused by him.

The defence set up to the claim on the bill for £97 0s. 10d. was that it included the purchase price of a sewing-machine, which had not been delivered; that consequently there had been a failure of consideration, and that damages had resulted from the breach of contract.

The Court ordered the plaintiff to go into the rincipal case.

The Chief Justice: It is unfortunate that the plaintiffs have not had the necessary time to answer the affidavit made on behalf of the defendant. We have now only to deal with the defendant's affidavits, and the answer to the claim upon the bond seems to me to be complete. The answer is that there was a bill of exchange for which the bond was given, and that the bill has not been tendered to the defendant. Still, this has been remedied now by a tender of the bill of exchange in court, and therefore the Court would not be prevented on that account from giving provisional sentence subject to the plaintiffs paying the costs up to date of tender. But then there is a further defence. Interest is payable on the bond at 6 per cent. per annum, payable on June 30 and December 31, and the defendant alleges that he has tendered 6 per cent. interest, but the plaintiffs claim 8 per cent. If it is true that the defendant has tendered 6 per cent. then the plaintiffs could not recover on the bond; so long as it is within the year it is to run the plaintiffs cannot claim the full amount of capital. It is quite possible that if the plaintiffs had had time to answer the affidavit a different light might have been thrown on it. Then with regard to the bills of exchange, as to that for £25, there is no defence, but as to that for £97, there seems tobe a defence as to failure of consideration—that it included the price of a sewing-machine worth £50, which was not tendered to defendant within the time contracted for. Upon the whole, we think it is far better that the plaintiffs should go into the principal case, the costs of this application to be costs in the action.

[Plaintiffs' Attorneys, Messrs. Fairbridge & Arderne; Defendant's Attorney, G. Montgomery-Walker.]

Re INSOLVENT ESTATE ELLIS.

Mr. Sheil moved, on behalf of creditors of the estate of Mr. O. H. Ellis, of the farm of Milton, in the district of Umzimkulu, East Griqualand, for the appointment of a provisional trustee pending the election of a permanent trustee.

The Court granted the order and appointed Mr. L. F. Zietsman, of Rokstad, provisional trustee.

Ex parte WEBBER.—*Re* CAPE OF GOOD HOPE BANK.

Mr. Sheil moved for leave to the petitioner to file a claim for £20, due on a Cape of Good Hope Bank note.

The order was granted as prayed.

DOWERS v. GOODMAN. { 1894. Dec. 13th.

Pauper—125th Rule of Court—Mechanical dentist—Professional etiquette.

Where a mechanical dentist, under an agreement for three years to serve the respondent at a salary of £4 per week, had left the employment because his employer was not a qualified dentist, and petitioned the Court for leave to sue his employer in forma pauperis *in an action for damages for misrepresentation,*

The Court held, *that the applicant was not a pauper within the meaning of the 125th Rule of Court.*

Mr. Graham moved for an order to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action for the recovery of damages for breach of contract and misrepresentation.

Mr. Molteno for the respondent.

The applicant gave the following evidence:

James Dowers, the applicant, said that he was a married man; his wife was in England. He was a mechanical dentist by trade. On 21st September, 1894, he entered into a written agreement with the respondent's London agents to serve him for a period of three years at a salary of £4 per week. The agreement stated that Goodman was a dentist. In terms of his agreement applicant came out to Cape Town, but when he had been in the respondent's service for some time he ascertained that Goodman was not himself a dentist but was merely the proprietor of the Dental Institute. Witness declined to carry out the contract as he had been induced to come to the Cape on the understanding that Goodman was a dentist.

Since he left Goodman's he had not been able to obtain permanent employment, but he had obtained temporary employment from Mr. Abbott, the proceeds of which he sent to his wife. He had no means whatever.

Cross-examined by Mr. Molteno: Before he came out he earned 50s. a week for six years. Had not saved anything owing to trouble and the fact that he had to help his mother. During the time he was with Goodman (four weeks) he received £4 per week. Goodman had one properly qualified dentist, Mr. Field.

By the Court: He was put under Mr. Field at the institute. Did not know if Field was properly qualified. He left because Goodman was not a dentist, as he would have lost caste altogether by stopping with him, which would

have prevented his getting any future employment from a properly qualified dentist. He also objected to work at the institute on the ground that the work was cheap and low class. He had been in the habit of doing very superior work in London.

Affidavits were put in from all the leading dentists practising in Cape Town bearing testimony to the fact that the applicant would be unable to obtain employment from properly qualified dentists if he had continued to work for an unqualified man such as the respondent.

The Court discharged the rule.

The Chief Justice said: I do not think the plaintiff is a pauper in the sense intended by the rule of Court. He came out here on a very good salary, and he very rashly threw up this appointment for the sake of professional etiquette, but the real reason seems to have come out when he was in the box—that he had to do a rather low class of work. It is, however, difficult even now to say what was the real reason for his leaving the respondent's employment, whether it was owing to professional etiquette, or because he was asked to do a low class of work; but he admits that he served under a professional dentist at the institute. The defendant should not be harassed with a pauper suit in this case unless the Court is well satisfied that the plaintiff is a pauper in the true sense of the term. The Court is not satisfied of that, and therefore the rule must be discharged, but the costs of this application can be costs in the case.

[Petitioner's Attorney, D. Tennant, jun.; Respondent's Attorneys, Messrs. Fairbridge & Arderne.]

ANDERSON'S ASSIGNEE v. ANDERSON'S EXECUTORS. { 1894. Dec. 13th.

Assignor and assignee—Mutual will—Survivor — Surrender of life interest — Advances —Inheritance—Inventory— Forfeiture.

By the mutual will of A. *and his wife, married in community, it was provided that if* A. *should survive his wife he should be executor and remain in possession of the joint estate for life, and that upon his death the whole of such joint estate should be paid to their children.*

The wife died first and A. *did not take out letters of administration nor frame an inventory or account, but remained in possession of the joint estate.*

From time to time he made advances to his son W., *which both understood as advances made in respect of inheritances coming to the son out of both estates.*

W. *assigned to the plaintiff, for the payment of his creditors, the sum of £10,000, given to him by his father for the purpose, and further all right, title, and interest to which he was then or might thereafter become entitled under the will of his parents.*

Upon the death of A. *the assignee claimed a forfeiture of all sums accruing to the joint estate after the wife's death* (under section 15 of Ordinance 104) *on the ground of* A.'s *neglect to frame an inventory, and that any advances made to* W. *should be regarded as coming out of* A.'s *estate only.*

Held, *that the assignee had no greater claims than the assignor had, and that such assignor having received his full share of the inheritances coming to him out of both estates with the knowledge that it came from the joint estate would not have been entitled to succeed in the action.*

This was an action instituted by George William Steytler in his capacity as sole surviving assignee of the assigned estate of William George Anderson, jun., against the executors testamentary to the estate of the late William George Anderson, sen., of Rondebosch.

The declaration alleged that William George Anderson, sen., and his wife Maria Anderson, to whom he was married in community of property, made a mutual will on 12th April, 1860. In terms of the will, the survivor of the testators, together with the children of their marriage, were appointed heirs of all the property and effects of the first dying, and it was provided that if William George Anderson, sen., survived his wife he should remain in full possession of the joint estate, and be entitled to the usufruct of the same during the term of his natural life. It was also specially provided that the survivor of the testators should be bound and obliged to cause an inventory and appraisement of the joint estate to be made, in order to ascertain the portions of inheritance of the heirs out of the estate of the first dying, and upon the decease of the survivor the whole of the estate and effects of the testators were to be paid to their children or their descendants, share and share alike.

3. The said Maria Anderson died on the 15th March, 1862, leaving her said will of full force and effect. At the said date the joint estate was possessed of considerable assets. But the

said William George Anderson, sen., did not frame an inventory thereof, and ascertain the maternal portion of the children of the marriage, of whom William George Anderson, jun., was one, but, contrary to law and to the directions of the will, he remained in possession of all the assets of the joint estate without framing any such inventory.

4. At divers times between the years 1877 and 1892 inclusive the said William George Anderson, sen., advanced to his son, William George Anderson, jun., various large sums of money, amounting in all to £27,008 12s. 6d.; the plaintiff annexes hereto a memorandum (marked B) showing the particulars and dates of the said advances.

5. The moneys so advanced formed no portion of the inheritance due to Willlam George Anderson, jun., from the estate of his mother; but they were advances made to him by his said father from funds which formed part of his own share of the aforesaid joint estate, and of the profits accruing from the usufruct of the share of his late wife. The said William George Anderson, sen., made similar advances after his wife's death to several other children of the marriage.

6. In or about the month of April, 1891. the said William George Anderson, jun., entered into a written contract with his creditors, in terms of which he agreed for legal consideration to pay, cede, and make over to assignees in trust for his creditors: (*a*) The sum of £10,000; (*b*) all his right title, and interest in any inheritances to which he was then, or might thereafter become entitled under the will of his parents and as an heir of a deceased sister; (*c*) certain other assets not necessary to particularise. And on the 29th April, 1891, in terms of the said agreement, he executed a written deed of assignment, in terms of which all his rights hereinbefore mentioned were duly ceded to the plaintiff in trust for his creditors.

7. The said sum of £10,000 was advanced by the said William George Anderson, sen., to the said William George Anderson, jun., and was by him duly paid to the plaintiff, and on the 16th August, 1893, the said William George Anderson, sen., died, leaving the will aforesaid in full force and effect, and the defendants have received letters of administration in due form as executors testamentary of his estate.

8. The defendants have framed and filed a first liquidation and distribution account in the estate of the late William George Anderson, sen., in which they have treated all the assets in the joint estate as forming the estate of the said William George Anderson, sen., and have brought into collation "in account" the sum of £10,000 advanced to William George Anderson, jun., as aforesaid, and also various other advances made to certain of his brothers and sisters, and they contend that the whole estate should be so liquidated, and all the moneys advanced to the said William George Anderson, jun., should be brought into collation.

9. The plaintiff contends that the said account has been wrongly framed, inasmuch as the share of the joint estate which belonged to the late Maria Anderson has not been separately dealt with and the maternal inheritance of the heirs defined: they further contend that, inasmuch as the said William George Anderson, sen., wilfully neglected to cause an inventory of the joint estate to be framed within the time provided by law or at all, he has forfeited in terms of section 15 of Ordinance 104, all right to and share in anything which may have accrued to the joint estate after the death of the said Maria Anderson.

The plaintiff claimed:

(*a*) An order declaring that the account should be amended:

1. By ascertaining the amount of the joint estate of Mr. and Mrs. Anderson as it existed at the death of the said Maria Anderson.

2. By adding any increase since that date to Mrs. Anderson's share of the joint estate.

3. By ascertaining on the above basis the maternal inheritance of the said William George Anderson, jun.

(*b*) An order declaring that the plaintiff is entitled to be paid the maternal inheritance of the said William George Anderson, jun., without any deduction whatever.

(*c*) An order declaring that, if the advances hereinbefore referred to as made to the said William George Anderson, jun., must in law be brought into collation, they should be collated only in so far as his father's share of the joint estate is concerned.

(*d*) Such alternative relief as to this Honourable Court may seem meet.

(*e*) Costs of suit.

The defendants in their plea put the plaintiff, to proof of the assignment. They admitted the advance of £27,008 12s. 6d. to W. G. Anderson, jun., but they said that of that amount £17,008 12s. 6d. were advanced to him before the execution of the deed referred to in the sixth paragraph of the declaration, on account of any inheritance devolving upon him under the said will.

They put the plaintiff to proof of the deed.

They said that the sum of £10,000 paid to the plaintiff was a farther advance (made with the knowledge of the plaintiff and the consent of all parties interested in the estate) to W. G.

Anderson, jun., and formed portion of the advance of £27,008 12s. 6d. above referred to.

They admitted the allegations in paragraph 8 of declaration, and with regard to that paragraph and paragraph 9, they said that they were justified under the circumstances set forth in the plea in framing the account in this manner. With further reference to paragraph 9, they said that the second contention of the plaintiff therein contained was irrelevant to this suit, and they denied that W. G. Anderson, sen., wilfully neglected to cause an inventory of the joint estate to be framed, but they admitted that no such inventory had been discovered in the estate. They denied that the absence of such an inventory entailed in law a forfeiture of all right to anything which might have accrued to the joint estate after the death of the testatrix, and they did not admit that anything did so accrue to the joint estate.

That W. G. Anderson, sen., in terms of the mutual will, retained the whole estate in his possession after the testatrix' death, and made large profits in business as a merchant therefrom after her death.

That the share accruing to W. G. Anderson, jun., out of the assets left at the death of W. G. Anderson, sen., and now in the defendants' hands, will in no case amount to the sum of money which was advanced to him as aforesaid, and which must be deducted from his share before he receives anything, and he is not now entitled to claim anything out of the said assets under the circumstances above set forth, nor is the plaintiff as his assignee so entitled.

The replication joined issue.

Mr. Rose-Innes, Q.C., and Mr. Juta, Q.C., for the plaintiff.

The Attorney-General and Mr. Graham for the defendants.

Thomas Barry Herold deposed that he was first clerk in the Master's Office. In the papers filed there was no inventory of Mrs. Anderson's estate. There was a death notice of Mrs. Anderson filed in November, 1895. The death notice of Mrs. Anderson was only sent in after the death of Mr. Anderson. There was no executor appointed in Mrs. Anderson's estate at all. The liquidation account produced was that of Mr. W. G. Anderson, sen. There had been an application by the defendants to add the name of Mrs. Anderson, but the Master had ruled that the executor in Mr. Anderson's estate could not act in Mrs. Anderson's estate.

Cross-examined by Mr. Schreiner: The application made to the Master was to insert the words in the liquidation account, "and his deceased spouse." The Master did not allow the alteration because there was no executor dative to Mrs. Anderson's estate. Had there been an executor dative, the Master would not have objected to the addition.

George William Steytler, assignee of W. Anderson, jun., deposed that he was a party to the deed of assignment as one of the liquidators of the Union Bank. The deed contemplated the payment of £10,000 by Mr. Anderson. It was understood that the family would provide the £10,000. Ultimately, after the deed of assignment went through, the money was paid into the bank to a separate account After the death of Mr. Anderson a notice appeared in the "Gazette" calling upon creditors in the estate of W. G. Anderson, jun., to send in claims before the 31st December, 1893. Witness communicated with the advertisers. W. J. Anderson called on him, and said they did not mean to pass him over; but there were no receipts. The original deed of assignment was in the Deeds Office. His objections to the account were stated in the declaration.

Cross-examined by Mr. Schreiner: At the time of the compromise he investigated the affairs of W. G. Anderson, jun., and he had a conversation with W. J. Anderson about it. It was clearly understood that W. G. Anderson, jun., had received over £16,000. He admitted to his creditors that he had received an amount far in excess of what he was entitled to from his father's estate. The creditors were not aware of the conditions of the will. He investigated the affairs of W. G. Anderson, jun., on behalf of all the banks. (Account-book of W. G. Anderson, sen., was produced, showing the advances to his son; they were all made after the death of Mrs. Anderson.) He had been through that book, and in that book all the heirs were debited with whatever sums were advanced. That book was begun in 1877, and there must have been a book prior. Mr. Anderson from the death of his wife dealt in the book with the whole estate as though it was exclusively his own. There were entries in the book showing that the heirs received advances on account of the estate. Witness, as assignee, received £10,000 compromise, and he gave the receipt as to W. G. Anderson, sen. He wrote to W. G. Anderson, jun., stating that he had received it, and afterwards signed the release of the latter on the 30th April, 1892. Witness was aware that it was a frequent practice with executors to administer an estate as a massed estate when the heirs were equally entitled. Witness's interest was the interest of W. G. Anderson, jun., and he would not say he was entitled to receive more than W. G. Anderson himself would have received. He represented all the banks interested in the estate.

Re-examined by Mr. Innes: He was never aware that there was any separate estate of Mrs. Anderson.

W. J. Anderson, one of the defendants and executor in the estate of W. G. Anderson, sen., his late father-in-law, deposed that he had taken the leading part in the administration. He was the spokesman of W. G. Anderson, sen., on the subject of the compromise. The £10,000 was paid out of the estate of W. G. Anderson, sen. In November, 1890, he had interviews with Mr. Steytler on the subject of the compromise, and the £10,000 was subsequently paid on behalf of W. G. Anderson, jun. The money was advanced out of W. G. Anderson, sen.'s, estate. He had dealt with the estate as one estate. He had found it absolutely impossible to divide the estate. W. G. Anderson made two or three small legacies after his wife's death, but with these trivial exceptions the estate was equally divided among the heirs. No one suggested that an executor dative should be appointed in Mrs. Anderson's estate. The will was found in the office of Fairbridge & Arderne, who drew it up. Witness first knew he was to be an executor in the estate from W. G. Anderson himself, about a year or two after his wife's death. The value of the joint estate in 1862, roughly, would be about £40,000 to £50,000, and at Mr. Anderson's death about £150,000. He had been unable to find an inventory from 1862 to 1872. He had searched in every direction, but could not find books covering that period, but he hardly conceived it possible that W. G. Anderson did not keep books during that period. As soon as the banks agreed to accept the £10,000 witness returned to England. The sum of £10,000 had been paid to T. J. Anderson. Supposing the unrealised assets were realised, it would give W. G. Anderson, jun., probably £4,000 to £5,000 over the £10,000, but £15,000 altogether would be the outside limit.

Cross-examined by Mr. Innes: The balance of the £150,000 came from the business. There were no legacies. The late Mr. Anderson was a very accurate man, not likely to make mistakes.

By the Court: The entries were made as advances made against shares of inheritance. There is one item which was entered as a loan, £1,811 16s., which had not been paid in full. Another, £1,500, had been repaid. The entry "Cape of Good Hope Bank, £500," was an advance.

W. G. Anderson, jun., deposed that he was one of the executors in the estate, and made the assignment to the plaintiff. He made a full explanation to his creditors before doing so. There was a full surrender of assets, and he eventually got the release, the deed of which had been put in. He explained the position fully to the creditors. The statement showing the £16,240 was correct. He got the sums of money from his father, taking it that they were given on account of inheritances from his father and mother. He was aware his mother's estate was left in the hands of his father; and that his father had control of it. He had not seen the will himself. He was not aware as to his father being appointed executor in his mother's estate. He placed this position before his creditors. He considered the advances to be given on account of inheritances due. As to the sum of £1,811, he was to pay interest on this. He had been unable to pay the amount. Other amounts, he supposed, were to have been settled on the death of his father.

Cross-examined by Mr. Innes: He did not know the contents of his mother's will. On the understanding that he would inherit under his mother's will he from time to time obtained advances. His father was particularly accurate in accounts. He knew his mother's estate was in existence, and that his father had charge of it, and that was all he knew. His father had carried on an extremely profitable business. He took it that the estate was a continuing one, and that one estate included the other. The £1,811 appeared to him to have been a temporary loan. Eventually he took it as a similar advance to the others, as he found he could not repay it. The £500 was simply an advance to himself from his father to use as an investment.

By the Court: He always considered the amounts advanced as on account of inheritances.

John Stewart, bookkeeper with the firm from 1873, deposed that in 1887, after Mr. Anderson, sen., stopped making entries in the book, he made certain entries. He went through all the accounts and filled up the last entries in the book, having the custody of the same. As to the books of the firm, he remembered some old books being destroyed about thirteen years ago. This was before Captain Murison's death. He was unable to find any books before the year 1873, except an old book of 1852 showing a balance of £5,470 in favour of Mr. Anderson, sen. Witness prepared an account showing advances to other heirs. It would not be possible to determine with accuracy the exact position of the trust estate in 1863.

Thomas Johnson Anderson deposed that he was one of the executors and the eldest son of the late W. G. Anderson. He was eighteen years old when his mother died. He always regarded his father as being absolutely in charge o his mother's estate, and always thought of it all as one estate.

Cross-examined by Mr. Juta: He was not aware his mother left a will, and did not know she was married in community. He was told by the late Charles Fairbridge that there was a joint estate. He thought the estate was a massed one, and that his mother's estate was merged in that of his father.

By the Court: He was aware that his brother was getting advances from time to time, and he thought these were from the joint estate. He had also received advances.

Mr. Rose-Innes, Q.C.: The accounts have not been properly framed and must be amended. W. G. Anderson not having framed an inventory his estate forfeits everything which accrued to the joint estate after the death of his wife. The present case differs from *Lucas* v. *Hoole* (Buch. 1879, p. 132). See also *Smith & Others* v. *Sayer's Executors* (Foord 66).

The Chief Justice said: I quite agree with Mr. Innes that the accounts have been incorrectly framed, and that they ought to have shown the amounts of the inheritances due to the heirs of the first dying testator. But even if the accounts had been framed in due form the question would still have remained whether the assignor, Wm. G. Anderson, jun., did in fact receive from his father, as the usufructuary of the joint estate, the share of inheritance due to the assignor as one of the heirs of the first dying. That question really depends upon what passed between father and son when the advances were made. Neither appears to have had a very clear notion of their respective rights, and could not perhaps have analysed the legal nature of the transactions between them, but substantially they understood that there was a joint estate, that the father was the administrator of that joint estate, and that any advances made to the son would thereafter be deducted from any inheritances coming to him out of such joint estate. As the person having the life interest in the joint estate the father could validly surrender his life interest in whole or in part, and this he must be considered as having done in respect of the maternal portion which was to come to the son after the father's death. If this was the true nature of the transaction, and I have no doubt that it was, the plaintiff can have no claim against the father's executors. The plaintiff as assignee has no stronger claims upon the estate than the assignor would have had. If it had been the plaintiff's own evidence, which was very fairly given, would have placed him out of court. He accepted the sums which his father gave him as advances on account of the inheritances which would come to him out of both estates, and the fact that those estates were not treated as separate estates by his father would not assist the son if he has received more than he was entitled to receive. Even if the plaintiff were to succeed in his claim that the estate of the father should, by reason of his having neglected to frame an inventory, forfeit all share in profits which have accrued since Mrs. Anderson's death, the amount due to the assignor would not in any way be increased. The estate of the first dying would be much larger than that of the survivor, but the son's inheritance would be the same. Having received everything he had to receive, and accepted it as payment out of both estates, he could not claim a forfeiture which could not in any way benefit him. Judgment must therefore be given for the defendants with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Fairbridge & Arderne.]

LIQUIDATORS CAPE OF GOOD HOPE BANK V. DE BEERS MINES AND DUNKELSBUHLER AND CO. { 1894. Dec. 14th.

Principal and agent—Concession—Cession of action—Ownership—Fraud—Theft—*Vindicatio.*

An agent who improperly applies the funds of his principal towards the purchase of a concession for himself is liable to account to the principal for all profits made out of such concession.

The unauthorised purchase of such a concession in the agent's name does not vest the ownership in the principal so as to enable him to follow it up in the hands of third parties who had acquired cession thereof bona fide *and for valuable consideration.*

The declaration stated that the manager of the plaintiff bank improperly and fraudulently purchased a certain mining concession with moneys belonging to the bank and afterwards sold and ceded his rights of action to the defendants, but did not allege that the defendants purchased with knowledge of the manager's fraud.

Held, *on exception, that in the absence of such an allegation, the declaration disclosed no ground of action to compel the defendants to account to the bank for all profits made by them out of the concession.*

This was an action instituted by the official liquidators of the Cape of Good Hope Bank against De Beers Consolidated Mines (Limited) for transfer of quarter share in the Wesselton (Premier) Mine, or in the alternative for £500,000 damages, and against Dunkelsbuhler & Co., for an account of all profits made by them, through their agent, Gustav Imroth, in dealing with the quarter share in the Premier Mine acquired by Imroth from Wm. Lawrence, for some time manager of the Cape of Good Hope Bank at Kimberley.

The declaration alleged *inter alia* that on 24th January, 1890, Lawrence, who was then the manager of the Cape of Good Hope Bank at Kimberley, purchased with moneys of the bank from one Henry Alfred Ward a quarter share in certain rights held by Ward under certain agreements entered into between Ward and one Johannes Jacobus Wessels, under which agreement Ward became entitled for the sum of £10,000 to purchase the diamondiferous farms Oliphantsfontein and Benaauwdsfontein, upon which a certain diamond-mine, to wit, the Wesselton Diamond-mine, is situated, for the sum of £300,000.

The rights as acquired by Ward are referred to in the pleadings as the "Ward Concession."

Lawrence did not account to the bank for his purchase of the quarter share in the Ward Concession, which, as the plaintiffs alleged, upon the purchase became and was the property of the bank, but fraudulently and against the will of the bank converted the same to his own use and benefit.

On 8th February, 1891, Lawrence wrongfully, fraudulently, and unlawfully, and in violation of his duty to the bank, entered into an agreement with Gustav Imroth, acting for and on behalf of Dunkelsbuhler & Co., whereby he granted to Imroth, subject to certain conditions, the sole and absolute power to sell and dispose of the interests, which he had purchased from Ward, in such manner and upon such terms as Imroth might think fit, and on such sale or disposal Imroth agreed to pay Lawrence £5,000. (A copy of this agreement was annexed to the declaration.)

One of the conditions mentioned in the agreement was that Imroth should investigate Lawrence's title, which was then disputed by Ward, to the quarter share in the "Ward Concession," and at his own cost and charges take steps to establish the same by legal proceedings or otherwise as he should think fit.

On the 31st March, 1891, Imroth, acting as the agent of Dunkelsbuhler & Co., and as the representative of Lawrence, granted and assigned to De Beers for the sum of £15,000 the sole right to purchase Lawrence's share in the "Ward Concession" for the sum of £45,000 at any time during the continuation of the term of the agreement between Lawrence and Ward, subject to certain conditions which were embodied in a formal contract which was executed on April 21, 1891. (A copy of this contract was annexed.)

By the terms of this agreement Imroth was to pay Lawrence £5,000 out of the £15,000 paid to the former by De Beers. The payment by Imroth to Lawrence was made a condition precedent to the receipt by Imroth of the balance of the £15,000.

De Beers further agreed to take over and discharge all costs that might be incurred in establishing Lawrence's claim against Ward to his share in the "Ward Concession" and to indemnify Imroth in respect thereof.

De Beers paid Imroth £5,000, and he paid the same over to Lawrence on the 9th April, 1891, and subsequently Imroth received from De Beers £10,000, the balance of the £15,000.

In an action tried in the Supreme Court on the 23rd, 24th, 25th, and 26th June, 1891, Lawrence was declared, as against Ward and Wessels, entitled to quarter share in the "Ward Concession."

The plaintiffs alleged that the fraudulent and unlawful acts of Lawrence were fully disclosed and made public, and became known to the defendants during the hearing of the said action.

Immediately after judgment had been delivered in the action on 26th June, 1891, the plaintiffs gave Imroth notice of their claims against Lawrence, and also gave him notice not to part with any moneys which he held on account of Lawrence.

Subsequently, on 26th August, 1891, De Beers, with full knowledge of the fraud which had been practised on the bank by Lawrence, and knowing full well that the said share in the "Ward Concession" was the property of the plaintiffs and not the property or in the lawful possession of Lawrence, exercised their alleged right of purchase under the agreement of 21st April, 1891, with Imroth on behalf of Dunkelsbuhler & Co., and bought for the sum of £40,000 from Imroth the interests acquired by him from Lawrence under the agreement of 8th February, 1891, and thereafter De Beers duly obtained transfer from Lawrence of his one-fourth share in the "Ward Concession." De Beers subsequently acquired from Ward and one Coronel the remaining three-fourths of the "Ward Concession," and purchased the farms Oliphantsfontein and Benaauwdsfontein for the sum of £300,000, which sum was paid and transfer taken on 28th December, 1891.

The plaintiffs alleged that they were always ready and willing to exercise the rights obtained by Lawrence on behalf of the bank from Ward, and to pay their share of the purchase price of the farms, but that they were prevented from doing so by the wrongful and unlawful acts of the defendants.

The plaintiffs contended that they were entitled to demand from the defendants, De Beers, on payment by them (the plaintiffs) of quarter of the purchase price of the farms, transfer of quarter undivided share of the farms Oliphantsfontein and Benaauwdsfontein, and also to claim from each of the defendants an account of all profits made by them, or either of them, in connection with any dealing with or by the sale of the quarter share in the "Ward Concession" acquired by Lawrence. Or in the alternative the plaintiffs said:

That the interests in the "Ward Concession" over the farms Oliphantsfontein and Benaauwdsfontein acquired by Lawrence from Ward having been obtained by Lawrence with moneys belonging to the Cape of Good Hope Bank, and for and on account of the bank, as agent of the bank, the property in the one-fourth share, and interests in the farms never vested in Lawrence, and never passed to Imroth, or to the De Beers Consolidated Mines (Limited), but remained vested in the bank. The plaintiff claimed as against the first-named defendants:

(*a*) An order that they were entitled to transfer and delivery of the one-fourth undivided share in the farms Oliphantsfontein and Benaauwdsfontein, on payment by them of one-fourth portion of the purchase price of £300,000, or in the alternative:

(*b*) £500,000 damages.

(*c*) An account of all profits and gains made by them through or in respect of the purchase, sale, or dealings with the one-fourth share in the "Ward Concession," and payment of all sums that may be found due in respect thereof to the plaintiffs, with interest *a tempore moræ*.

(*d*) General relief and costs.

And as against the second-named defendants:

(*a*) An account of all profits and gains made by them in dealing with in any way, or by the sale to the defendants, De Beers, of the interests in the "Ward Concession" acquired by Imroth from Lawrence, and payment of all sums due in respect thereof, with interest *a tempore moræ*.

(*b*) General relief and costs.

The first-named defendants excepted to the declaration on the grounds: (1) That even if the allegations in the declaration were true they disclosed no cause of action against the De Beers Company, and (2) that the declaration was bad in law, because the plaintiffs having elected thereby to sue Dunkelsbuhler & Co. as their agents for an account of all profits made by them in respect of the purchase of the quarter share in the "Ward Concession," it was not competent for the plaintiffs at the same time to claim from the defendant company either transfer in the quarter share of the farms, which formed the subject of the concession, or an account of the profits made by them in respect of their purchase of the said share in the concession, or to claim damages in the premises.

The second-named defendants also filed two exceptions to the declaration. The first exception was in similar terms to the first exception taken by De Beers, and the second exception was as follows:

2. By a judgment of this Honourable Court, of date August 27, 1891, the said Court decided the matter at issue in this suit in an action in which the said Imroth, who acted as the agent of the second-named defendants, was applicant, and the plaintiffs were respondents, and the said matter is *res judicata*, in proof whereof the defendants crave leave to refer to the records of this Honourable Court.

Both the defendants then pleaded over, their pleas being in almost similar terms.

They admitted the formal allegations in the declaration, but denied that Lawrence acquired the one-fourth share in the "Ward Concession," with moneys belonging to the bank, or that he converted the same to his own use and benefit.

They put the plaintiffs to proof that Imroth acted as the agent of Lawrence in the transaction of 31st March, 1891.

They denied that Lawrence's alleged fraud was disclosed at the trial.

They said that when Imroth received notice from the plaintiffs on 26th June, 1891, Lawrence had no interest in the concession, nor did Imroth on that date hold any moneys on behalf of Lawrence.

They denied that the plaintiffs were ready and willing to exercise the rights acquired by Lawrence from Ward, or to pay their share of the purchase price of the farms.

They denied the validity of the plaintiffs' legal contentions, and prayed that their claims might be dismissed with costs.

The replication joined issue.

Mr. Forster and Mr. Sheil appeared for the bank.

Mr. Rose-Innes, Q.C., and Mr. Webber for De Beers Consolidated Mines (Limited).

Mr. Solomon, Q.C., and Mr. Juta, Q.C., for Dunkelsbuhler & Co.

The Court decided first to take the argument on the exceptions of the defendants Dunkelsbuhler & Co., that no cause of action was disclosed in the declaration.

Mr. Solomon, Q.C., said that the exception taken was that even if the facts stated in the declaration were true, there was no cause of action disclosed in the declaration. The contention of the plaintiffs was that Lawrence having acquired his interest for himself with money obtained from the Cape of Good Hope Bank, the share vested in the bank. But if a person took stolen money and bought property with it, and then sold it to a person for valuable consideration, the owner of the stolen money could not recover that property. That was the principle laid down by Roman-Dutch law. There was only a personal action against the person who stole the property. He cited the *Code* (3, 32, 6); *Voet* (6, 1, 11); *Van Lee. Cen. For.* 4. 3. 9).

The Chief Justice said an action would lie against the thief. Supposing a man stole money and he purchased a horse with it, if the owner of the horse knew it was stolen money the purchase money could be recovered from the owner of the property sold. Had the agreement between Lawrence and Imroth ever been subject to the decision of the Court? Was it a contract that could be maintained at all? Was it not in the nature of champerty?

Mr. Solomon replied that it was not. What further interest had Lawrence in the concession after he was paid the £5,000 in April, 1891? After the £5,000 was paid Lawrence had no right, title or interest in the share. It was admitted in the declaration that the £5,000 was paid in April 1891.

Mr. Justice Buchanan: If this agreement is an altogether invalid agreement then Lawrence has not parted with his share.

Mr. Solomon contended that there was nothing to make it invalid. It was not alleged in the declaration that the agreement was invalid. As a matter of fact, the £5,000 was paid before the action was brought in this Court.

The Chief Justice: I do not quite understand upon what ground the action is based. If Imroth has brought a lawsuit he takes it subject to all the equities to which Lawrence would be subject, and if Lawrence is guilty of fraud towards the bank, Imroth takes the share subject to that fraud.

Mr. Solomon contended that Lawrence had parted with all interest in the share prior to June, 1891. As soon as Imroth paid the £5,000 the share belonged to him. De Beers only bought the right to the option. How could the share possibly belong to Lawrence when he received the price he asked—£5,000?

The Chief Justice: The only point is, supposing that Lawrence's claim is subject to the equitable right of the Cape of Good Hope Bank, does not the purchaser Imroth take it subject to the same equities? That is the only point.

Mr. Solomon said it was not alleged that Imroth knew that Lawrence had obtained this share by using the bank's money: therefore the share must be the property of the purchaser. The bank might have a personal action against Lawrence in regard to the share, but Imroth knew nothing of this.

The Chief Justice: But would not the doctrine of agency apply?

Mr. Solomon said the principle of Roman-Dutch law was clear that if an agent had authority, either express or implied, to buy a certain thing for his principal, and he went and bought the thing for himself, with his own money, the principal could claim the thing from him. If, under no authority from his principal, the agent bought a thing for himself, surely he did not acquire it for his principal, but for himself. As long as Lawrence had no authority from the bank he acquired that share for himself; and the bank could only claim from him a refund of the money which he took out of the bank. The bank might have a personal right against Lawrence, but not against the purchaser of the share. If Lawrence had failed to establish his right to the concession Imroth could not have reclaimed the £5,000; and if Lawrence had become insolvent his trustee could have had no possible claim.

The Chief Justice: What did Lawrence pay for the share?

Mr. Solomon: £2,500.

Mr. Solomon argued that Lawrence's interest was completely wiped out when Imroth paid the £5,000, and he could deal with it as he liked. He maintained that Lawrence having acquired this interest for himself—not as an agent to the bank at all, although he might have used the bank's money—the *dominium* in the share vested in him alone.

Mr. Innes, Q.C., said that the contract was for the purchase of an option. The lawsuit was only an incident in it. Imroth did not want to buy the lawsuit; he wanted the option. The agreement clearly set out that Imroth had full power to dispose of the share. It was at Imroth's choice whether he fought the action or not. He sold to De Beers the option to take an option, and received the money and handed it over to Lawrence. There was nothing whatever in the contract to prevent Imroth selling to himself if he had liked to take the share over for £5,000,

Mr. Forster, for the plaintiffs, said the plaintiffs' cause of action was founded upon fraud. They based their case upon two points: First of all, that the defendants had full knowledge of the fraud, and secondly, if they had not, the common law of this country would enable the plaintiffs to follow up the property of which they had been defrauded, and take it from the possession of whoever might hold it. This was not a case of money stolen and then converted into a chattel. This was a case of the theft of a chattel which was of such a nature that it could be followed up, and the plaintiffs could put their fingers upon it in the hands of the person who had acquired it. Where an agent had dealt with the property of his principal to his own advantage the *dominium* of what he acquired vested in the principal and not in the agent. What the plaintiffs maintained was that Lawrence being the agent of the bank at Kimberley and a trustee in a fiduciary position, had the power to use the bank's money for the bank's purposes; and in doing so he had absolute discretion as to how he should invest or deal with that money, consequently the mere fact of his buying this share in the concession with the bank's money did not amount to a conversion, but when he appropriated it to his own use and sold it for himself then a conversion came in, and he argued that the owner was entitled to follow it up to the end.

The Chief Justice: Ordinarily a bank manager has no right to buy options. Do you say it is within the scope of the authority of a bank manager to buy claims and options from Ward as he did here?

Mr. Forster said that a bank manager had certain discretion, and had very much authority relegated to him in such cases.

The Chief Justice: Your declaration reads as if Lawrence bought for himself. You ought to have alleged that Lawrence, having authority from the bank, purchased on behalf of the bank.

Mr. Forster: The declaration states that Lawrence "acquired with the moneys of the bank."

Mr. Justice Buchanan: If Lawrence had the authority of the bank to purchase surely he had the authority of the bank to sell; then you have an action against Lawrence.

Mr. Forster contended that if the property in the purchase by the agent became the property of the principal, then the agent could not grant a title to that property any greater than he himself possessed, and having no title to that property any sale by him thereafter became null and void, irrespective of fraud or anything else. He cited *Story, Equity Jurisprudence*, sections 1,258-1,259, and *Evans*, 481.

The Chief Justice: I don't think you need refer further to authorities, Mr. Forster. It is so clear that an agent is bound to account to his principal.

Mr. Forster said that the contract of the 8th February amounted only to this, that it created Imroth the agent for Lawrence for the sale of that particular portion of the concession. No absolute sale was mentioned. It only gave Imroth the right to sell the rights acquired by Lawrence, and until the sale took place Lawrence was entitled to no consideration at all. Until there was a sale to De Beers, Lawrence had no right, and could have maintained no action for the £5,000 under the agreement. That being so, Imroth could only give to De Beers the option to purchase whatever rights Imroth might have had from Lawrence. The sale was not completed until the following August, when the option was taken up; but in the meantime the case of Lawrence against Ward had been heard, and during the progress of that case it became established that Lawrence had committed a fraud on the bank, therefore Imroth on the 24th June had perfect knowledge that the fraud had been committed. The case for the plaintiffs rested entirely on the question of fraud, and that Imroth had a knowledge of the fraud. With regard to De Beers, it did not matter whether they had knowledge of fraud or not before 26th June; the property could be recovered wherever it was if it could be proved that the transaction was tainted with fraud.

The Court allowed the exception with costs, excepting the expenses of witnesses from Kimberley.

The Chief Justice said: If the present action had been brought against Lawrence there would have been no doubt that the declaration discloses a good cause of action. He was the agent of the bank and, if he appropriated the funds of the bank in purchasing for himself a share in the "Ward Concession," he became liable to account to the bank for any profits made by him out of the purchase. This liability he incurred not because the ownership of the concession was vested in the bank but by virtue of the well-established rule that the principal is entitled to the benefit of all profits made by his agent in violation of his duty. But the action has been brought against the purchaser of Lawrence's rights of action and against the De Beers Mines, who have bought that purchaser's rights, and the fatal objection to the declaration is that it does not allege that the defendants were aware before, or at the time when they made their respective purchases, of the fraud committed by Lawrence upon his

principals. Of course, if there had been a complete transfer for value to the bank of Lawrence's right of action in respect of the "Ward Concession" the bank alone could have enforced it, and neither of the defendants could have derived any benefit from Lawrence's unauthorised dealings with the concession, but no such transfer was effected in favour of the bank. Lawrence acquired a share in the "Ward Concession" out of funds belonging to the bank, but he did so wholly outside the scope of his authority as manager, and the declaration does not even allege that he acquired the share on behalf of the bank. As I read the declaration he purchased the share for himself. The fact that he used stolen money for the purpose does not enable the owner of such stolen money to follow up either the money or the thing purchased with the money in the hands of third persons without proof, at all events, of knowledge on their part of such theft. The declaration does indeed allege that the fraudulent acts of Lawrence became known to the defendants in June, 1891, during the hearing of an action brought in this Court by Lawrence against Ward, but at that time the second defendants had already bought and paid for their rights in the "Ward Concession," and the first defendants had paid £15,000 for the sole right to purchase Lawrence's share in the "Ward Concession." The flaw in the declaration is the absence of any allegation that the defendants acquired their rights with knowledge of Lawrence's fraud. Without proof of such knowledge it would be impossible to hold the defendants liable to account to the plaintiffs, as liquidators of the bank, for all profits made by them out of their purchase of Lawrence's share in the "Ward Concession," or to give the plaintiffs the other relief prayed for in the declaration. The exception must therefore be allowed with costs, except the expenses of witnesses from Kimberley. These expenses would not have been incurred if the exception had been set down for argument before the day of trial.

Mr. Justice Buchanan: I fully concur that there is no cause of action disclosed in the declaration. There is no allegation of fraud, no allegation of knowledge of fraud, and no allegation of any money having been paid after notice was given.

[Plaintiffs' Attorneys, Messrs. J. & H. Reid & Nephew; Defendants' Attorneys, Messrs. Scanlen & Syfret, and Gus. Trollip.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

ADMISSION.

Ex parte SIMONS. { 1894. Dec. 18th.

On the motion of Mr. Shippard, Mr. Joannes J. C. B. Simons was admitted as an advocate of the Supreme Court.

MEYER V. SCHOEMAN.

Mr. Molteno applied for an order that respondent do forthwith pass transfer to applicant of certain piece of land described as Lot 6 of the farm De Congo, in terms of consent paper filed by the parties.

Mr. Graham consented on behalf of the respondent.

Order granted.

IN THE INSOLVENT ESTATE OF THE LATE WILLIAM GLENDENNING.

Mr. Graham moved for an order authorising the Master of the Supreme Court to call a meeting of creditors to elect a trustee to the said estate in the room of Edward J. M. Syfret, deceased, for the purpose of realising a plot of ground at Camp's Bay, the same being an asset of the estate.

Order granted.

Ex parte ANDERSON. { 1894. Dec. 18th.

Curator bonis—Husband.

Husband appointed curator bonis *of his demented wife's estate with power to draw money to her credit in the Savings Bank to pay her creditors and expenses at a lunatic asylum.*

This was the petition of one Anderson, married in community of property to his wife, Charlotte E. Anderson, who is at present detained in Robben Island lunatic asylum under a lunacy order signed by the Resident Magistrate of Kimberley dated 24th August, 1894, under Act 35 of 1891, section 7.

The petitioner alleged that his wife had the sum of £63 16s. to her credit in the Post-office Savings Bank, Kimberley. That there were creditors who had to be paid their claims, and

that it would be to the interest of his wife that a *curator bonis* should be appointed. The prayer was that the petitioner might be appointed *curator bonis* of his wife's estate with power to draw the money to her credit in the Savings Bank, and that the Attorney-General might be appointed *curator ad litem* in proceedings about to be instituted to have Charlotte E. Anderson declared of unsound mind.

Mr. Jones for the petitioner.

The Court appointed the petitioner *curator bonis* to administer his wife's property, to pay her debts and expenses of maintenance in the lunatic asylum.

[Petitioner's Attorneys, Messrs. Scanlen & Syfret.]

Ex parte BULTITUDE.

Mr. Molteno moved for leave to file a claim on certain Cape of Good Hope Bank notes.

Order granted.

Ex parte SYBEL AND OTHERS. { 1894. Dec. 18th.

Master and servant—Desertion—Act 15 of 1856, chapter 5 (2) Magistrate's discretion.

This was the petition of George Sybel and three others, fishermen, residing at Cape Town.

The petitioners alleged that they were arrested at the instance of Messrs. Stephan Bros., of Cape Town, on the 14th inst., at Cape Town, for contravention of section 4, sub-section 6 of Act 18 of 1873. That the petitioners appeared before the Resident Magistrate of Cape Town on the 15th inst., charged as aforesaid, and through their agent took certain exceptions to the legality of the arrest and proceedings. The Magistrate declined to uphold the exceptions, and without taking evidence ordered the petitioners to be removed from this district for trial at Malmesbury, and allowed bail to the extent of £10, the petitioners to appear at Malmesbury at any time after three days' notice of trial.

The petitioners alleged that they were now anxious to have the arrest set aside, on the grounds that clause 2, chapter 5 of Act 15 of 1856, had not been complied with, and that it appeared from the affidavit filed with the original proceedings in the Resident Magistrate's Court, heard on the 15th inst., and made by Johan Carl Stephan, at Cape Town, on 11th December, 1894, as well as from the affidavit of the petitioners' agent, dated 15th December inst., the arrest was illegal, in that there was no valid and substantial contract, nor was there any such agreement as would render the petitioners liable to the penalty of the Master and Servants' Law of this colony.

That, failing the above, the petitioners were anxious to obtain from the Court an order for a temporary interdict restraining the Resident Magistrate of Cape Town from removing the petitioners from Cape Town until such time as would allow them to bring the matter of their arrest, and the proceedings thereunder, before the Supreme Court under appeal, which appeal they intended to bring forthwith.

The prayer was that the arrest might be set aside, or failing that that a temporary interdict might be granted restraining the Resident Magistrate of Cape Town from removing the petitioners to Malmesbury pending the decision of the appeal.

It appeared from Mr. Stephan's affidavit that the petitioners were employed under a yearly contract of hire, and that on the 24th July last they deserted the service of Stephan Bros. from St. Helena Bay.

That on the 10th August a complaint was lodged against the petitioners at St. Helena Bay, and the deponent alleged that it was necessary to secure their appearance before the Resident Magistrate of Malmesbury, at his Periodical Court at St. Helena Bay, to have them apprehended or otherwise they would not appear, and he therefore applied for a warrant for their apprehension. Upon this affidavit a warrant was issued, under which the petitioners were arrested, and ordered by the Resident Magistrate to be removed to Malmesbury for trial.

Mr. Graham, in support of the application: The Resident Magistrate of Cape Town had jurisdiction to consider the charge (Act 15 of 1856, chapter 5, section 2). In any case the Resident Magistrate had nothing before him to justify him in ordering the petitioners' removal to Malmesbury.

Mr. Giddy, for the Crown: The Resident Magistrate has expressed his opinion that it would be more convenient for witnesses to go from St. Helena Bay to Malmesbury than to Cape Town.

Mr. Molteno, for Stephan Bros., relied upon Act 30 of 1889, section 3.

The Court refused the application.

The Chief Justice said: Under the second sub-section, chapter 5 of Act 15 of 1856, a Resident Magistrate has very wide discretion in regard to the removing of cases of this kind. It enacts that whenever it shall appear to him that such case can be more conveniently tried by the Resident Magistrate of any other district, he

shall dismiss such case, and in the event of his doing so, when a servant or apprentice is accused of desertion, and when he shall have probable cause shown to him for believing this to be the fact, such magistrate may, if he thinks fit, issue a warrant for the conveyance, under sure custody, of each servant or apprentice to the town or place where the Court of such other magistrate is held. Now the Magistrate of Cape Town, after reading the affidavit of Mr. Stephan, came to the conclusion that inasmuch as these persons deserted from their master in the district of Malmesbury, the trial could more conveniently take place at Malmesbury. Well, I think this affidavit of Mr. Stephan was sufficient to justify the Magistrate to act as he did. But besides this, I cannot lose sight of the fact that Mr. Faure was for several years Magistrate of Malmesbury, and he would be more conversant with the local conditions of the place than we are, and must have been satisfied that it would be more convenient for the witnesses at St. Helena Bay to be brought to Malmesbury than to Cape Town. Under these circumstances, I do not think this Court ought to interfere with the discretion of the Magistrate of Cape Town. Of course there is still the risk that the men may be sent on from Malmesbury to St. Helena Bay, but that is not before us, and under the circumstances I do not think we should be justified in interfering with the discretion of the Magistrate of Cape Town.

Mr. Justice Buchanan: I concur. I do not consider that this is a case in which we should interfere with the Magistrate's discretion.

Mr. Justice Upington: I am of the same opinion.

[Petitioners' Attorney, D. Tennant, jun.; Attorney for Stephan Bros., C. C. de Villiers.]

SUPREME COURT.

(IN CHAMBERS.)

Before Mr. Justice BUCHANAN and Sir THOMAS UPINGTON, K.C.M.G.

Ex parte ELLIOTT. { 1894. Dec. 27th.

Mr. Buchanan moved for leave to file the petitioner's claim with the liquidators of the Cape of Good Hope Bank in respect of certain notes in his possession, notwithstanding that the period for filing such claims has expired.

Order granted.

Re ESTATE OF THE LATE RUDOLPH P. COETZEE.

Mr. Jones moved for leave to sell certain landed property known as Modderfontein, and part of Wolvenkloof, in the district of Graaff-Reinet, by public auction, for the purpose of paying certain bond thereon, and to invest the balance on first mortgage for the benefit of the heirs.

Order granted, the minor's portion to be paid in to the Master.

Re ESTATE OF THE LATE AUGUSTA H. MEYER.

Mr. Jones moved for leave to the executor testamentary to obtain transfer of certain piece of land at Port Elizabeth, purchased by him from the estate of his deceased wife, but never transferred into his own name.

Order granted.

EILENBERG V. JACOBSON AND CO.

Mr. Sheil moved for leave to attach and sell in execution of a judgment of the Supreme Court, certain outstanding debts and land belonging to the firm of Jacobson & Co., of Namaqualand.

Application ordered to stand over for the return of the Deputy Sheriff.

APPENDIX.

SUPREME COURT.

CRIMINAL SESSIONS.

[Before the Chief Justice, Sir J. H. DE VILLIERS, K.C.M.G.]

REGINA V. ISAACS. { 1894. Oct. 16th.

Criminal lunatic—Sanity—Crown—Onus.

Where a criminal lunatic detained during the Governor's pleasure had been charged with the crime of murder,

Held, *that before the prisoner could be called upon to plead to the indictment the onus of proving that he was sane lay on the Crown.*

In this case the prisoner, who had some years ago been indicted for the crime of murder and acquitted on the grounds of insanity, and who was at present detained as a criminal lunatic at Robben Island, was charged with murder in that on or about the 16th July, 1894, he did wrongfully and maliciously kill and murder (by means of poison) Willem Hansen, the minor son of Carl Hansen, lighthouse-keeper. Robben Island.

Prisoner was about to be arraigned, when Mr. Graham, who defended, said that as the prisoner had been detained as a criminal lunatic by order of Court, a jury should be empannelled to show whether the prisoner was in a position to plead.

The Chief Justice: I think it will be necessary to empannel a jury to ascertain whether the prisoner is in a state of mind which would justify the Court in taking his plea, and I go further, and think that the onus of proving that prisoner is in a fit state to plead lies on the Crown, considering that the prisoner has been detained on Robben Island as a criminal lunatic.

Mr. Giddy: The only point at issue is whether the prisoner is now in a position to plead, and not whether he was sane or insane at the time of committing the alleged crime.

The Chief Justice: That is the only question to be tried by a jury empannelled for that purpose.

The jury was then empannelled as a special jury to decide the question of whether or not the prisoner was now in a position to plead.

After the medical and other evidence was given the jury found the prisoner of sound mind.

The prisoner was then arraigned and pleaded not guilty, and the charge of murder was proceeded with.

The jury returned a verdict of not guilty, but the prisoner was removed to Robben Island under the previous order of Court.

DIGEST OF CASES

VOL. IV.

PAGE

Account — Balance — Action—Frame & Myburgh v. Boose 345

Act 23 of 1888, Sec. 28.
An unconvicted prisoner found guilty of an offence under section 28 of Act 23 of 1888 cannot be sentenced to receive lashes.
Regina v. Jantje Sly 8

Administrators—Trusts—Release.
Where persons had been appointed executors testamentary and administrators of certain trusts constituted by the will, and they had finally liquidated the estate as such executors but were still administeriny the trusts, the Court at their request relieved them from their trust, and substituted a Trust Company in their place on the company finding security to the satisfaction of the Master of the Supreme Court.
Ex parte Kingsmill and Anderson *re* Crockart's Will 100

Adultery—Divorce Damages.
Where a woman, who was living apart from her husband under a deed of separation, and there was no hope of reconciliation between the parties, had committed adultery,
The Court in an action for divorce by the husband refused to give damages against the co-defendant, a journeyman saddler, earning 5s. 6d. per diem.
Budd v. Budd and Freeman 170

2. —— Damages—Collusion—Natives — Proclamation No. 140 of 1885.
Where a native's wife had committed adultery, and damages had been given against her paramour in an action brought by the husband in the Magistrate's Court, although there was no evidence as to whether the plaintiff and his wife were married before or after the Proclamation No. 140 of 1885,
The Court, on appeal, *refused to reverse the Magistrate's decision.*
The fact that the guilty spouse is living at her husband's kraal only raises a presumption of collusion which may be rebutted.
Madolo v. Munkwa 195

3. —— Connivance—Divorce—Partnership—Dissolution.
R. *suspecting that her husband had been unfaithful to her, instructed her attorneys to employ a private detective to watch his movements.*
The attorneys employed a detective and gave him instructions to watch and report if R.'s *husband went to a house of ill-fame.*
The detective exceeded his instructions and prompted a prostitute whom he knew to accost R.'s *husband. The prostitute did so and* R.'s *husband committed adultery with her.*
Held, *in an action for divorce instituted by* R. *against her husband, that the conduct of the detective did not amount to connivance on the part of* R.
A partnership to carry on a hotel business existing between R. *and her husband dissolved by order of Court on a decree of divorce being granted.*
Robinson v. Robinson 243

4. ——Divorce—Division of joint estate —Appointment of receiver—Van der Westhuizen v. Van der Westhuizen 389

PAGE

Agent—Removal or suspension of—Appeal — Notice to Attorney-General.

Where an order of a Resident Magistrate's Court for the removal or suspension of an agent is brought in review under the 37th section of Act 20 of 1856, notice of the appeal should be given to the Attorney-General.

Roos v. Resident Magistrate of Robertson 334

Animal diseases—Lung-sickness—Act 2 of 1881, section 8—Conviction under repealed section—Act 24 of 1886, section 129, sub-section 5—Neglecting and refusing to place infected cattle in quarantine.

Where a native living in the Transkei had been convicted under the 8th section of the repealed Act 2 of 1881, there being no corresponding section in the repealing Act 27 of 1893,

Held, *that the conviction was wrong. The mere refusal of a native to place infected cattle in quarantine when ordered to do so by his headman does not amount to a contravention of Act 24 of 1886, section 129, sub-section 5.*

Regina v. David Gwyl 144

2. —— Glanders — Act 27 of 1893, section 9 — Field-cornet—Obstruction — Landowners — Divisional Council — List — Government approval—Publication in *Gazette*.

B., *the Field-cornet of Port Elizabeth, having received information that one of* R.'s *horses was suffering from glanders, went to* R.'s *house accompanied by two landowners whose names appeared on the list recommended by the Divisional Council in terms of section 9 of Act 27 of 1893, but the list had not been approved of by Government, nor had it been published by notice in the Gazette,*

PAGE

R. *refused to admit them on his premises.*

R. *was summoned in the Resident Magistrate's Court for obstructing* B. *in the execution of his duty, under section 9 of the Act, and fined £25.*

Held on appeal, *that as* B. *had not been accompanied by two qualified landowners within the meaning of the section* R. *had committed no offence in refusing* B. *admittance. Conviction accordingly quashed.*

Regina v. Reed 219

Ante-nuptial Contract—Bond—Erroneous instruction to Notary — Non-registration — Act 21 of 1875, section 7.

M. *before his marriage instructed a notary to draw up an ante-nuptial contract.*

M. *purported in the contract to settle a bond for* £1,800 *on his intended wife. After the execution of the contract, and* M.'s *marriage, the notary discovered that an erroneous description of the bond had been given, and before he could receive fresh instructions from* M., *who really wished to bring two bonds amounting to* £1,930 *into settlement, the period within which ante-nuptial contracts must be registered under Act 21 of 1875, section 7, had expired, and the contract was not registered.*

The Court, on an application for relief, allowed an amended contract containing a correct description of the bonds to be registered.

Ex parte Malan. — *Re* Malan's and Faurie's Ante Nuptial Contract ... 205

2 —— Delay in registration — Notary Public—Costs.

Where through the omission of a Notary Public an ante-nuptial contract was not registered within the time prescribed by law, the Court ordered the registration of the contract on condition that any expenses occasioned by the delay, including

PAGE

the costs of the application for registration, should be paid by the notary.

Ex parte Van der Spuy *re* Moore and Snayman's Ante-nuptial Contract... 4

Appeal—Delay in prosecuting.

On the 9th March, 1894, S. *obtained judgment in the Magistrate's Court of Cape Town against a Benefit Society, of which he was a member, for sick pay.*

On the 14th March an appeal was noted by the defendants, but they took no further steps.

Thereafter, on the 26th June following, S. *applied to the Court for an order barring the defendants from prosecuting the appeal.*

The defendants opposed the application and alleged that the delay in prosecuting the appeal was occasioned by the resignation of one of the trustees, and that in consequence the power could not be signed in time to bring the appeal in the Supreme Court term following the judgment, another trustee having to be appointed to fill the vacancy.

The Court ordered the appeal to be prosecuted within the seventh day of the next Supreme Court term. The costs to abide the result of the appeal.

Stemmet v. The Trustees of the Independent Companion Society ... 203

Architect—Professional services—Plans and specifications—Error in levels—Claim in reconvention—Damages—Arbitration.

In an action by an architect for the balance of account due for professional services in connection with the erection of a building, the defendant admitted the debt but pleaded that the plaintiff had prepared the plans in so negligent and incomplete a manner that additional expenditure very much exceeding the plaintiff's claim had been rendered necessary, and she claimed in reconvention, by way of damages, the extra expenditure which she alleged would be necessary to complete the building.

It appeared from evidence adduced at the trial that the question of the defendant's liability to the contractors for the extra expenditure had been referred to arbitration, and that the award of the arbitrator had not yet been given.

Held, *that the defence raised to the plaintiff's claim was premature, inasmuch as the arbitrator had not given his award, and as it was still uncertain whether the defendant would be held liable to pay for the extra expenditure, that consequently she had as yet sustained no damage, and that her plea disclosed no defence to the plaintiff's claim.*

Stent v. Williams, N.O. 365

2. ——Unapproved plans and specifications—Quantities.

An architect is not entitled to any remuneration for preparing plans and specifications unless they are approved of and adopted by the person engaging him.

If however an architect is instructed to take out quantities he is entitled to fair remuneration for his work.

De Witt v. Cape Canning Company ... 116

Articled clerk—Articles of clerkship—Non-registration — Rule of Court 212.

Where an articled clerk had served for over four years but his articles of clerkship for the first twenty-two months of this period had not, through an oversight, been registered in terms of Rule of Court 212, the Court refused to admit him as an attorney until he had completed a full period of three years' service from the date of the registration of his articles.

In re Brown (Buch. 1879, p. 73) *followed.*

Ex parte Kyd 153

PAGE

Assault—Damages—Provocation.

Where in an action in a Magistrate's Court, for £20 damages for assault, the Magistrate found that the assault had been provoked by the plaintiff's own conduct, and granted absolution from the instance on the claim for damages. The Court, on appeal, upheld the Magistrate's decision.

Phillips v. Goddard 213

Assignor and assignee—Mutual will—Survivor — Surrender of life interest—Advances—Inheritance—Inventory—Forfeiture.

By the mutual will of A. *and his wife, married in community, it was provided that if* A. *should survive his wife he should be executor and remain in possession of the joint estate for life, and that upon his death the whole of such joint estate should be paid to their children.*

The wife died first and A. *did not take out letters of administration nor frame an inventory or account, but remained in possession of the joint estate.*

From time to time he made advances to his son W., *which both understood as advances made in respect of inheritances coming to the son out of both estates.*

W. *assigned to the plaintiff, for the payment of his creditors, the sum of £10,000, given to him by his father for the purpose, and further all right, title, and interest to which he was then or might thereafter become entitled under the will of his parents.*

Upon the death of A. *the assignee claimed a forfeiture of all sums accruing to the joint estate after the wife's death* (under section 15 of Ordinance 104) *on the ground of* A.'s *neglect to frame an inventory, and that any advances made to* W. *should be regarded as coming out of* A.'s *estate only.*

Held, *that the assignee had no greater claims than the assignor had, and that such assignor having received his full share of the inheritances coming to him out of both estates with the knowledge that it came from the joint estate would not have been entitled to succeed in the action.*

Anderson's Assignee v. Anderson's Executors 447

Attachment—Inheritance—Marriage in community—Judgment—Costs.

The Court ordered the attachment and sale of an inheritance, to which a woman married in community of property was entitled after the death of her surviving parent, to satisfy a judgment against her husband.

Swanepoel v. Birk 6

2. ——*Ad fundandam jurisdictionem* — Money—Liquidators Cape of Good Hope Bank v. De Beers Consolidated Mines (Limited) and Imroth ... 155

Attorney—Professional misconduct.

An attorney, practising in the High Court of Griqualand, having been requested by the Judges of that Court, by means of a letter addressed to him by the Registrar, to explain certain statements made by him in an affidavit in a pending case which the Judges had reason to believe were incorrect, and having been further told that if such explanation were not given further proceedings would be taken against him, answered, in effect, that he would not give any explanation by letter, but that he would reserve anything he had to say till proceedings were taken, when he would have an opportunity of making his defence on oath.

It was proved to the satisfaction of the Supreme Court that the incorrectness of the statements was caused by a mistake in a telegram received by the attorney.

Held, *that there was no ground for a charge of professional misconduct against him.*

PAGE

Currey v. Incorporated Law Society—Incorporated Law Society v. Phear 15

2. —— Admission — Act 27 of 1883, section 14.

L., *who had served articles of clerkship for five years with a solicitor in England, and passed the solicitors' intermediate examination, but failed in the final, on the 12th January, 1892, applied to be admitted as an attorney of the Supreme Court.*

L. *was ordered to serve for another year in the Colony, and at the expiration of that period, without having passed any examinations, applied to be admitted as an attorney and notary.*

The Court refused the application, holding that L. *could not be admitted until he had complied with the 14th section of Act 27 of 1883.*

Ex parte Lee 295

3. ——Conviction on charge of theft—Suspension—Certificates.

Where an attorney had appropriated to his own use a cheque which had been paid to him in his capacity as secretary of a Divisional Council, and was subsequently tried and convicted on a charge of theft,

The Court, *on an application by the Incorporated Law Society, suspended the attorney from practice until the further order of the Court, and directed that no application should be made for the reinstatement of the attorney until three years had elapsed from the date of the Court's order.*

The Court *further directed the attorney to deliver his certificates to the Registrar.*

Incorporated Law Society v. Walker ... 397

Auction—Sale—*Bona-fide* mistake.

Where at a sale by public auction a purchaser bid for a mantelpiece, on which a gilt pier glass stood, under the impression that both the lots were being sold together, and immediately after he discovered that the lots were being sold separately, repudiated the purchase,

Held, *that there had been a* bona-fide *mistake as to the article sold and consequently no sale.*

Maritz v. Pratly 351

Auctioneer—Scope of authority—Conditions of sale.

S. & O. *were instructed by* V. *to sell certain erven for him.*

S. & O. *employed as auctioneer one of their clerks,* S., *who managed their business in the absence of the partners. The erven were sold subject to conditions of sale,* Clause 11 *of which provided that* purchasers should pay transfer duty, Government duty, auctioneer's commission, conditions of sale, *pro rata* share of advertisement, costs of survey and diagram, and transfer expenses.

Before the conditions of sale were signed S. *was asked what the expenses under* Clause 11 *would amount to, and without consulting* S. & O., *and without really knowing, said* not less than £5, but not more than £6.

W. *bought an erf at the sale and signed the conditions.*

The expenses under Clause 11 *of the conditions of sale amounted to* £9 3s. 5d.

In an action brought by S & O. *in the Magistrate's Court to recover the* £9 3s. 5d. *from* W. *the latter tendered* £6 *and pleaded that it was agreed between the plaintiff's qualified agent,* S., *and himself at the sale that the expenses under* Clause 11 *of the conditions would not exceed* £6.

Judgment was given for the plaintiffs for the amount claimed with costs, the Magistrate holding that S. *had not acted within the scope of his authority in stating that the expenses would not exceed* £6, *and that his statement to that effect was not binding on the plaintiffs.*

PAGE

Held on appeal *from the Magistrate's decision that* S. *did not enter into a contract on behalf of* S. & O. *at the sale that the expenses would not exceed* £6.

Van Wyk v. Sauer and Orsmond ... 149

Benefit Society—Arbitration—Pleadings.

One of the rules of a Benefit Society provided that: Should any question arise which cannot be decided by a reference to these rules, it shall be left to the decision of the Arbitration Committee of members to be elected at the general election of officers; and any member acting contrary to the decision of the arbitrators shall be fined 1s.

In an action brought in a Magistrate's Court by a member of the society against the trustees for sick pay and sick visitor's pay, the defendants did not specifically plead the rule as to arbitration, nor did they except to the Magistrate's jurisdiction, but defended the case on the merits.

Judgment was given in favour of the plaintiff.

Held on appeal, *from the Magistrate's judgment, that inasmuch as the rule as to arbitration was not pleaded or relied upon in the Court below it could not be relied upon in the appellate Court as a bar to the action.*

Independent Companions Society v. Stemmet 228

Bond—Cancellation.

Where for thirty years no interest had been paid on a bond, and there was strong presumption that the amount of the bond had been paid, the Court granted a rule calling upon all persons interested to show cause why the entry in the Debt Register should not be cancelled.

Ex parte Herman.—*Re* Krul's Estate ... 239

Building Contract—Balance of account — Action — Small & Morgan v. Young 48

2. ——Balance of account—Action—Watson v. Haupt 402

3. —— Extras — Damages — Action — Gladstone v. Stableford 297

Bye-law—Village Management Board—Act 29 of 1881—Tax—*Ultra vires. Section* 19 *of Act* 29 *of* 1881 *provides*, inter alia, *that* it shall and may be lawful for every Board of Management to provide for the management and protection of all common pasture lands and the preservation of all vegetation thereon, and the fixing of the number and description of live-stock any inhabitant shall be allowed to keep and depasture thereon or on any part thereof; or to provide for the granting of temporary grazing rights over the said lands to travellers or carriers or other persons frequenting or passing through the said locality, and for the payment of reasonable dues in consideration thereof.

The Village Management Board of W., *wishing to defray the expenses of fencing the commonage from a neighbouring native location, passed a bye-law imposing a tax of* 3d. *per head per month on all cattle allowed to graze on the commonage and belonging to persons entitled to graze cattle on the commonage.*

L., *an erfholder in the village and entitled to run cattle on the commonage, having refused to pay the tax in respect of certain cattle belonging to him, was summoned in the Magistrate's Court for the amount of the tax, and judgment was given against him.*

Held on appeal, *reversing the Magistrate's decision, that the tax could not be imposed, the bye-law being* ultra vires.

Barling v The Town Council of Cape Town (Buch. 1875, p. 101) and Prince Albert Board of Management v Jooste and Others (4 Juta, 400) *distinguished.*

PAGE

Langfield v. Whittlesea Village Management Board 231

Child—Custody.

B., *a resident of Cape Town, sued his wife for divorce on the grounds of her adultery with* F., *and prayed for the custody of the child of the marriage.*

A decree was granted but the custody of the child was given to the defendant's mother, as B. *stated in his evidence that he proposed to send it to Kimberley.*

Subsequent to the divorce proceedings F. *married the defendant, and after the marriage they continued to live at the house of the defendant's mother. The Court, on this fact being brought to its notice, and on being satisfied that* B. *had made ample provision for the care of his child, and on his undertaking to keep it in Cape Town, where the mother could have access to it, took the custody of the child from the defendant's mother and gave it to* B.

Budd v. Yeomans and Budd 250

Co-executors—Right of one co-executor in his personal capacity to sue his co-executor—Exception.

Where one co-executor had charged the estate certain costs to which he was not entitled,

Held, *that his co-executor could, in his personal capacity, sue for a refund of such costs.*

Hodgson v. Du Preez 340

Collation—Debt—Insolvent's discharge—Intention—Testator—Will.

In the absence of an indication of the testator's intention to the contrary, a debt incurred to him by a child but discharged by reason of such child's insolvency and subsequent rehabilitation must be collated by such child for the purpose of ascertaining the shares of inheritance due to all the testator's children under a will whereby he has appointed them as heirs in equal shares.

PAGE

A condition "that any sum which may be owing to the testator by his children must first be deducted from their inheritance" does not by itself afford such an indication of an intention to the contrary.

Steyn's Executors v. Steyn 75

Commission—Practice.

A person who takes out a commission should give the other side notice as to when and where the commission is to meet and witnesses be examined.

Prince, N.O. v. Adam and Zoer... ... 9

Compromise — Bank in liquidation — Debtor—Name.

The Court refused to sanction a compromise proposed to be effected with a debtor of a bank in liquidation, a condition of the compromise being that the debtor's name should not be made public.

Re Cape of Good Hope Bank, in Liquidation 322

Contract—Breach—Soda-water pump.

In May, 1893, the H. Co. *instructed* G. *to supply them with a pump to be used in the manufacture of soda water.*

G. *supplied the pump at a cost of £18 18s. 7d., but it did not give satisfaction.*

In September, 1893, the price of the pump not having been paid, G. *approached the* H. Co. *and offered to take back the pump.*

The H. Co. *declined this offer, but entered into an agreement of settlement which provided that* G. *should repair the pump and keep it in good order for one year free of charge, the* Co. *undertaking to pay the price on one* M. *certifying that the pump produced good commercial soda water.*

In October, 1893, the H. Co *paid* G. *£10 on account, and in January, 1894,* M. *certified that it was not the fault of the pump if the soda water were not good and that he considered that* G. *should be paid.*

PAGE

In an action brought by G. against the H. Co. for £13 7s. 9d., £8 8s. 7d. being the balance due on the pump, and £4 19s. 2d. being for work and labour done, the defendants pleaded that the pump had been tendered to the plaintiff, and claimed £20 in reconvention, £10 being the amount paid on account of the pump, and which they contended should be refunded, and £10 damages for breach of contract in not keeping the pump in repair.

The Magistrate found as a fact that G. had not fully carried out his undertaking to keep the pump in repair and consequently gave absolution from the instance on the claim for £8 8s. 7d., and judgment for £4 19s. 2d., with costs. He dismissed the claim in reconvention.

An appeal from this judgment was dismissed, but that part of it having reference to the claim in reconvention was altered to absolution.

Hope Aerated Water Company v. Gibbs 261

2. —— Breach — Damages — Lyons v. Jewish Public School 258

3. ——Breach—Medical attendance—Fees — Reasonableness — Molony v. The Colonial Government ... 166

Costs—Taxation—Review.

M. applied to the Licensing Court of Albert for a new licence to carry on the business of a bottle store in the Municipality of Molteno, and lodged a memorial in terms of Act 25 of 1891, section 13, sub-section 1.

The memorial did not contain the signatures of a majority of voters registered in the Municipality for the election of members of the Divisional Council.

The Licensing Court acting bona fide granted the licence, but on an application made to the Supreme Court by G. the proceedings were set aside as being illegal and costs were given against M.

PAGE

In the taxation of costs, certain charges for serving a copy of the notice of motion and affidavits on the Chairman and each member of the Licensing Court, including three members who had voted against granting the licence to M., were allowed.

The Court on review of this taxation refused to interfere with the Taxing Officer's discretion.

Manley v. Gibson and Morgan 217

2. ——New point raised on appeal—Appropriation of payments.

Costs refused where on appeal the amount of a judgment in the Resident Magistrate's Court was reduced by 11s. 7d. owing to the appellants succeeding on the question of appropriation of payments, that question not having been pleaded or raised in the lower Court; the defence in the Magistrate's Court being one founded on fraud, on which defence appellant failed.

Paulse and Roelof v. Theunissen ... 236

Criminal appeal—Irregularity—Waiver—Objection—Act 31 of 1892—Indecent publication — Notice of suit—Summons.

An objection to an irregularity which cannot affect the verdict at a criminal trial or otherwise prejudice the defendant in his defence, if not raised at the trial, cannot afterwards be taken on appeal.

In a summons against the proprietor of a newspaper for a contravention of section 2 of Act 31 of 1892, by selling an indecent or obscene publication, it is not necessary to set out the indecent words if they are otherwise clearly indicated by a reference to the name and date of the newspaper, and to the particular passage or passages therein which are complained of.

Regina v. De Jong 336

PAGE

Criminal lunatic — Sanity — Crown—Onus.

Where a criminal lunatic detained during the Governor's pleasure had been charged with the crime of murder. Held, *that before the prisoner could be called upon to plead to the indictment the onus of proving that he was sane lay on the Crown.*

Regina v. Isaacs 459

Criminal prosecution—Close of case—Evidence—Admissibility—Review.

Du P. *and* B., *two Europeans, were, together with three coloured men, charged with the crime of malicious injury to property before the Resident Magistrate of Worcester.*

An agent conducted the prosecution, and up to the time the case for the Crown and the defence had closed, no evidence whatever was adduced against Du P. *and* B.

The three coloured men were found guilty and sentenced, and, after an adjournment of the Court, were called to give evidence against Du P. *and* B. *The attorney for* Du P. *and* B. *objected to the evidence as the case for the Crown and for the defence had closed.*

The Magistrate overruled the objection, received the evidence, and convicted Du P. *and* B.

Held on review, *by a majority of the Court* (Barry, J.P., E.D.C., *dissenting*), *that the evidence was inadmissible, and that* Du P. *and* B. *had been wrongly convicted.*

Regina v. Du Preez and Badenhorst ... 252

2.——Criminal prosecution—Act 5 of 1879, section 25—Presiding Judge—No application to reserve point—Leave to appeal.

Where no application had been made at the trial of a prisoner before a Circuit Court for leave to reserve a point for argument before the Supreme Court,

PAGE

The Court afterwards on the petition of the prisoner, the Judge who presided at the Circuit Court consenting, granted him leave to appeal.

Regina v. Margolius 369

Crown—Prescription—Perpetual quitrent—Freehold.

Prescription runs against the Government in respect of land which can be alienated although the Legislature has fixed certain conditions upon which such alienation shall take place, but there must be clear proof that the occupation has been nec vi, nec clam, nec precario.

If the possessor has occupied the land in the belief that it formed part of another portion of land which he owned on perpetual quitrent tenure the Government would be justified in issuing a title on such tenure instead of freehold.

Blanckenberg v. Colonial Government 61

Crown liability — Stipulation in favour of third person—Treaty—Griqualand East—Adam Kok—*Bona-fide* title to land.

In 1862 Adam Kok was allowed by the British Government to settle with his tribe of Griquas in the territory known as Nomansland, one condition being that they should occupy the country as British subjects. They were, however, allowed to conduct the internal administration of the country without interference until the year 1874, when the Government of the Cape Colony intimated to the Chief and his tribe that the time was approaching when the direct rule of the Cape Government would be established over the country.

In reply, the Chief expressed his desire that the Government should take the initiative and that the country should not be annexed to Natal.

After some negotiation a final agreement for the annexation and rule of the country was made, stipulating,

PAGE

inter alia, *that all* bona-fide *and undisputed titles to land already issued should be confirmed by the Government, and by Act 38 of 1877, the country was annexed.*

Held, *in an action brought by three grantees, that, after accepting the benefit of the stipulations made on their behalf, they were entitled to recover damages from the Government for breach of its promise to confirm their titles, provided that the titles were* bona-fide *and undisputed. The Court not being satisfied that the titles issued to the plaintiffs were* bona-fide, *and considering the delay in enforcing their claim and the fact that three Commissioners, two of whom were now dead, had decided adversely to the claim, granted absolution from the instance.*

Strachan v. Colonial Government ... 405

Curator bonis — Insanity — Want of proof.

The Court refused to appoint a curator bonis to the estate of a person alleged to be insane, there not being sufficient evidence before the Court of the insanity.

Ex parte Schoeman.—*Re* Honi all ... 399

2. ——Deaf mutes.

Curator bonis *appointed to manage the property of deaf mutes who were incapable of managing their own affairs.*

Re Mostert 399

3. ——Husband.

Husband appointed curator bonis *of his demented wife's estate with power to draw money to her credit in the Savings Bank to pay her creditors and expenses at a lunatic asylum.*

Ex parte Anderson 456

Derelict Lands Act, 1881 – Farm—Sale —Transfer deed.

In 1858 M. *sold to his son* G. *one-fourth of a farm,*

PAGE

By the deed of transfer only one-eighth of the farm was conveyed to G., *the remaining one-eighth being registered in* M.'s *name.*

Thereafter M. *died and at the date of the application to the Court his estate was unrepresented.*

G. *remained in possession of and occupied the one-fourth of the farm until his death in 1893.*

Thereafter G.'s *widow and executrix applied, under the Derelict Lands Act of 1881, to have the one-eighth of the farm, registered in* M.'s *name, transferred to her husband's estate.*

The Court made no order, but suggested the appointment of an executor dative to M.'s *estate.*

Ex parte Zondagh. — *Re* Zondagh's Estate 307

Divisional Council—Bridge—Negligence —Damages—Non-liability.

Where a bridge situated on a divisional road had been so constructed as to permit of one vehicle only crossing at a time, and two vehicles travelling at night and coming in opposite directions, had attempted to cross the bridge at the same time, and one of the vehicles coming in contact with the railing, which had fallen into disrepair, was precipitated into the river bed, the horses being killed and the vehicle damaged,

Held, *in an action for damages by the owner of the horses and vehicle, that the Divisional Council was not liable, the uprights of the bridge being capable of bearing the ordinary traffic, and there being no evidence to show that the bridge had become unsafe for such traffic.*

Jordens v. Cape Divisional Council ... 174

Dogs—Destruction of—Act 40 of 1889, section 226 — Pound Act, 1892, section 26.

The plaintiff's dog having been in a fowl-house was shot by the owner

PAGE

of the land whilst running through an enclosure in which no animals were kept but which was within an outer enclosed place in which the owner's ostriches were kept.

Held, *on appeal, that the owner was not liable in damages for the destruction of the dog.*

Duthie v. Benn 67

Election Petition—Fixing day for trial —Security—Act 9 of 1883.

Where in connection with an election petition the security for costs provided for by Act 9 of 1883, section 4, sub-section 4, had been partially by recognizance, and the 21 days allowed the respondent by section 5 of the Act, within which he may object to the recognizance, had not elapsed, the Court refused to fix a day for the hearing of the petition.

Watermeyer and Van der Merwe v. Wege 135

2. ——Fresh charges—Practice.

An election petition should be framed ready for trial within the forty-two days referred to in Act 9 of 1883, section 4, sub-section 2.

If after the expiration of that period it is desired to bring forward fresh charges application shou d be made to the Court for leave to amend the petition.

Krige v. De Waal 136

3. —— "Bribery" — "Treating" — Agency—Krige v. De Waal ... 177

Watermeyer and Van der Merwe v. Wege 187

Evidence — Commission — Probable refusal of witnesses to attend at trial—Native chief.

Where in an application for a commission to take the evidence of a native chief and others of his tribe in an action against the Government, it was alleged that the witnesses would probably refuse to leave their country and come to Cape Town to give evidence at the trial.

PAGE

The Court *made no order, on the undertaking of the Attorney-General that the Government would do all it could to secure the attendance of the witnesses at the trial, and if necessary compel them to attend.*

Cook Bros. v. Colonial Government ... 444

Exception—Plea—Negligence in preparing plans—Damages.

S., *an architect, sued* W. *in her capacity as Sister Superior of St. George's Home, Cape Town, for the sum of £171 16s. 2d., balance of commission due for professional services rendered in connection with the designing and carrying out of plans for the erection of certain buildings for* W.

W. *in her plea alleged that owing to the negligence of* S. *in preparing his plans additional expenditure amounting to £500 was necessary in order that the contract might be completed, and that* S. *was liable to* W. *for the increased expenditure.* W. *also alleged that owing to improper instructions given by* S. *a further expenditure of £150 would have to be incurred, and she claimed in reconvention £650, less the amount of* S.'s *commission.*

There was no allegation in the plea that W. *had become liable for the £650, or that she had sustained damages in that amount.*

S. *excepted to the plea as being bad in law and that it afforded no defence to* S.'s *claim, inasmuch as there was no allegation in the plea that* W. *had suffered any damage, or had paid or was liable to pay any sum of money by reason of* S.'s *alleged wrongful acts.*

Held, *that the plea was bad, but leave was given to amend by inserting an allegation of damages.*

Stent v. Williams, N.O. 282

2. —— Amendment — Summons — Husband—Magistrate's discretion.

To a summons in a Magistrate's Court directed against a married

PAGE

woman trading in a name different from her husband's she excepted that the summons ought to have been directed to and served upon her husband also.

The plaintiff thereupon applied for leave to amend the summons and serve an amended copy on the husband, the plaintiff paying the costs of the day.

The Magistrate having refused the application,

Held on appeal, *that the Magistrate's discretion had not been unreasonably exercised.*

Smith v. Muff, trading as James & Co. 33

3. ——Lease—Cession—Partnership.

Where an action for rent due under two leases had been brought by a member of a dissolved partnership, and there was no clear allegation in the declaration that the plaintiff had received cession from the lessor.

Held, *on an exception taken to the declaration, that the plaintiff was not entitled to recover the rent sued for unless he alleged and proved a cession to him of the lessor's right.*

Exception accordingly allowed but leave given to the plaintiff to amend his declaration.

The question of costs to stand over.

Sephton v. Uyapi 343

Execution—Suicide of execution debtor —Insolvency.

Du Toit & Co., *on the 25th May*, 1894, *obtained judgment in the Supreme Court against* G., *and on 28th May they issued a writ of execution.*

On 2nd June, certain of G.'s *movables were attached by the Sheriff to satisfy the judgment.*

On 5th June, G. *gave notice of his intention to surrender his estate as insolvent, and intimated that his schedules would be filed at the office of the Resident Magistrate, Queen's Town, on the 6th June.*

PAGE

The schedules were not filed, but a petition by certain of Greeff's creditors for the compulsory sequestration of his estate was signed and the affidavit sworn to on the 11th June, and whilst the papers were in transit to Cape Town (on the 12th June) G *committed suicide.*

On the 14th June, an application by other judgment creditors of G., *who had not issued writs, was made to a Judge in Chambers for the compulsory sequestration of* G.'s *estate.*

The learned judge being made aware of G.'s *suicide, referred the application to the full Court.*

On the 15th June, the application was renewed in Court and refused.

On the 20th June, an application was made to t'e Court by creditors of G., *other than* Du Toit & Co., *for an interdict restraining the Sheriff from parting with the proceeds of the sale of the goods attached.*

The Court ordered the goods to be sold, but directed the Sheriff not to pay out the proceeds until further order.

G. *left a will under which he appointed his wife executrix testamentary but she did not take out letters of administration.*

On the 26th June, after the sale of the goods attached, Du Toit & Co. *applied to the Court to have the proceeds of the sale paid to them.*

Held, *following* Van Reenen v. Pearson (1 Ros., 236), *that* Du Toit & Co. *were entitled to the proceeds of the sale in satisfaction of their judgment.*

Du Toit and De Waal v. Greeff's Estate 199

Executor—Land—Private sale.

Under special circumstances, and where it was clearly for the benefit of the estate, the Court authorised a private sale of land to one of the executors.

Re Rautenbach's Estate 320

PAGE

2. ——Attorney and client—Costs *de bonis propriis.*

An executor has authority to employ an attorney at law to conduct lawsuits on behalf of the estate, and an attorney who is bona fide *employed for that purpose and conducts the suit honestly is entitled to recover his lawful fees and disbursements from the estate.*

An order in such lawsuit that the executor shall pay the costs de bonis propriis *by reason of his personal neglect or misconduct does not* per se *deprive the attorney of his right to recover his fees and disbursements from the estate.*

Quin v. Pilkington and Divine ... 436

Executor dative -Removal.

The Court, on the petition of his sureties, removed an executor dative, who had been convicted of the crime of theft, and who had allowed nearly three years to elapse from the date of his appointment without filing an account.

Mathlabane and Tala v. Spogter ... 250

2. ——Removal—Julies v. Marnewick 355

Executor testamentary—Application for release from office.

Where an estate had been practically wound up, the only duty incumbent on the executors testamentary being to pay over certain rents as they were received to one of the heirs, and one of the executors testamentary (The British Resident in Pretoria) *applied to be relieved of his office on the grounds of his official position, absence from the Colony, and consequent inability to give personal care and attention to the estate, the Court declined to grant the application.*

Ex parte De Wet.—*Re* Estate Jones and Wife 126

2. —— Account—Extension of time.

The Court refused to grant an executor-testamentary an extension of three years within which to file his final account, the estate having been open for eleven years, and it being the wish of the testator that it should be wound up within three years from his decease.

Ex parte Stone, *re* Stone's Estate ... 108

Expropriation—Land burthened with a *fidei-commissum*—Act 26 of 1893.

The Town Council of Cape Town can, under their Act 26 of 1893, expropriate for public purposes land burthened with a fidei-commissum, within the limits of the Municipality.

Town Council of Cape Town v. Hiddiugh's Executors 159

Extradition — Warrant — *Prima-facie* evidence.

Where there was sufficient prima-facie *evidence, in the opinion of the Law Officers of the Crown, to justify the issue of a warrant for the arrest of a person charged with theft in the South African Republic, and the alleged thief was arrested in the Colony and detained in gaol pending his extradition,*

The Court refused on the petition of the prisoner to order his discharge from custody, although the person, on whose affidavit the warrant was issued, alleged in a subsequent affidavit that possibly he had only a civil action against the prisoner.

Re Rothkugel 193

Fidei-commissum—Lapse—Death of the Fidei-commissaries in the lifetime of the Fiduciary.

In 1854 *the parents of* S. *by their mutual will bequeathed to her, after the death of the survivor, the usufruct of two farms with remainder to her two children.*

S.'s *mother died in* 1858 *and the surviving spouse adiated.*

S.'s *two children died in* 1860 *in their mother's lifetime.*

PAGE

In 1868 S.'s *father, who died in* 1873, *transferred to her the two farms* subject to the terms of the will. *Thereafter on the petition of* S, *the Court authorised an amendment of the transfer deed of* 1868 *by freeing it from the terms of the will.*

Ex parte Strauss 121

Fraudulent alienation — *Prima-facie* evidence—Interdict.

Where there was prima-facie *evidence that an insolvent, before his estate had been sequestrated, fraudulently sold to one of his brothers certain furniture and stock, the Court granted an interdict restraining the insolvent's brother from parting with the articles pending the bringing of an action by the* curator bonis *to have the sale set aside as fraudulent.*

Versveld's Executor v. Friedman ... 140

Growing crop—Destruction—Damages.

H., *the lessee of certain land, sold a growing crop of cabbages to* T. *on the understanding that the crop was to remain in the ground during the continuance of* H.'s *lease.*

Before the cabbages were fit for use H. *abandoned his lease and* De V. *took possession of the land as new lessee.*

De V. *failing to arrive at an understanding with* T. *with regard to the cabbages, gave him notice to remove them within nine days, and as they were not removed within that time* De V. *uprooted the cabbages and threw them away.*

T. *thereupon brought an action for damages against* De V. *in the Magistrate's Court and judgment was given for the defendant on the grounds that whatever claim* T. *had against* H. *he had none as against* De V.

On appeal, *the Magistrate's judgment was upheld.*

Trevaskis v. De Vos 241

Hotel business—Purchase on behalf of minor.

PAGE

Where it was clearly for the benefit of a minor, the Court authorised the purchase for the minor of a hotel business, which had been previously carried on by his father.

Ex parte Lyons and Smith 98

Husband and wife – Injury to wife—Proper person to sue—Exception.

To a summons in an action brought by the plaintiff as the husband of H., *to whom he is married in community of property, for damages for injuries done to her and his child and property by reason of the negligence of the defendant's servant, the defendant excepted that the action ought to have been in the name of* H.

Held, *reversing the decision of the Magistrate, that the exception was bad and that the husband was the proper person to sue.*

Michler v. Saunders 38

2. —— Assistance of wife—Power to sue — Magistrate's Court Act, 1856, section 15 – Wages of wife—Community of property.

The plaintiff, a woman married in community of property, sued the defendant in a Magistrate's Court for wages earned as nurse to defendant's wife.

The power to sue and the summons stated that she was assisted by her husband, and the power to sue was signed by both.

Held, *that a cause of action had accrued to the plaintiff, and that, although married in community, she was entitled under the 51st section of Act 20 of 1856 to sue in the Magistrate's Court as plaintiff assisted by her husband.*

Clark v. Johnson 428

Insolvency—Trustee—Proof of debt.

Where no creditors had appeared at the first or second meeting in an insolvent estate and no trustee was elected, the Court, on the petition of certain creditors, authorised them to

PAGE

call a meeting for the proof of their debts and the election of a trustee on condition that they paid all expenses in connection with the meeting and election.

Ex parte Garlick and Ruddle 10

2. ——Trustee—Account—Extension of time.

The Court, with a view to saving costs, granted an extension of time, within which to file his account, to a provisional trustee, who was threatened with an action to recover the value of certain assets sold by him on account of the estate and claimed by a minor.

Ex parte Hoffa. — *Re* Terblanche's Insolvent Estate 215

3. ——Provisional trustees.

Where upon the petition of a majority of creditors representing claims amounting to £2,000 *two provisional trustees had been appointed, and no election was declared at the second meeting, the Court refused to substitute the nominee of a creditor for over* £6,000 (being the balance of the purchase price of a farm sold to the insolvent but of which he had not taken transfer) *although no notice had been given to such creditor of the application for the appointment of the provisional trustees.*

Greef's Executrix v. Steytler and Wilmott. — *Re* Lewin's Insolvent Estate 109

4 ——Provisional trustee with power to carry on business—Application for appointment before final decree.

Where before the final adjudication application was made for the appointment of a provisional trustee in an insolvent estate to carry on the insolvent's business, that of a bottle-store keeper, the Court refused the application but referred the matter to the Master to appoint a curator bonis.

Re Secretan's Insolvent Estate 185

PAGE

Insolvent Ordinance — Section 30 — Petitioning creditor — Security — Value—Promissory note.

The Court discharged a provisional order for the sequestration of an estate, where the petitioning creditor made no reference in his petition to, and placed no value upon, a promissory note held by him as collateral security, although in the summons upon which he obtained judgment, for the non-payment of which the insolvency proceedings resulted, he tendered the promissory note in question among other securities held by him.

Standard Bank v. Van Buuren 327

Interdict.

The Court granted an interdict restraining a respondent from receiving certain moneys due to him and the applicant by the Government, pending the bringing of an action by the applicant for breach of contract.

The rule was ordered to stand as the summons.

Ex parte Carter.—*Re* Carter v. Stewart 159

Interest — Mortgage bond — Summons —Provisional sentence.

Where on the face of a mortgage bond it appeared that interest at half per cent. per annum was payable and the summons in a provisional case claimed the amount due on the bond and interest,

The Court *granted provisional sentence for the amount claimed with interest, but refused to hold that the half per cent. per annum interest stipulated for in the bond was intended for interest at half per cent per month or 6 per cent. per annum.*

Bester's Executor v. Bennet's Executor 32

Interpleader suit—Trespass—Cattle—Damages—Evidence of ownership.

Where a writ had been issued attaching certain cattle in satisfaction of a judgment for damages for trespass,

PAGE

and the defendant's brother claimed the cattle in an interpleader suit.

Held, *that as there was no satisfactory proof that the cattle were the claimant's property they were liable to attachment.*

Bain v. Botha 364

Intestacy—Heir—Identity—*Ex parte* Rioloen—*Re* Fatima's Estate ... 323

Joint-stock Company—Licence—Act 3 of 1864, schedule 17—Act 20 of 1884.

The 17th schedule to Act 3 of 1864, as amended by Act 20 of 1884, provides that: Every joint-stock company carrying on business in this colony shall annually take out a licence, for which there shall be payable for every £100 of the subscribed capital of such company 1s.

The term joint-stock company shall, for the purpose of the above licence, embrace: (*b*) Every such company of which the chief seat or principal place where its business is managed shall not be within this colony, but of which any of the dealings shall, by the deed or other instrument regulating such company, be described as to be carried on in this colony.

The memorandum of association of the H. Co., *whose principal place of business is in London, and which has been established in Cape Town since May, 1893, provides that one of the objects of the* Co. *is to carry on* "in any part of the world" *the business of wholesale and retail clothiers and outfitters.*

Held, *in an action instituted by the Colonial Government, that the* Co. *was liable to pay an annual licence of 1s. on every £100 of its subscribed capital, the language employed in the memorandum of association,* "in any part of the world," *being sufficient to include Cape Colony in terms of section 1, sub-section (b) of the schedule.*

PAGE

Colonial Government v. British South Africa Company (9 Juta, 280; 2 Sheil, 216) *distinguished.*

Colonial Government v. Hepworth & Son, Limited 282

Jurisdiction—Magistrate's Court Acts—Set-off or compensation—Reconvention—Liquidated demand—Unliquidated damages.

In an action for £2 18*s.*, *in respect of money lent the defendant excepted to the jurisdiction on the ground that he had a counter claim for* £259, *two items of which amounting together to* £9 *constituted the purchase price of cattle but the remaining items were for unliquidated damages.*

Held, *on appeal, that the Magistrate had jurisdiction to decide upon the plaintiff's claim, inasmuch as the items of the counter claim which were capable of being pleaded in compensation were not in excess of his jurisdiction and, being distinct from the other items of the counter claim, could have been claimed in reconvention in this action.*

Jooste v. Petzer 77

2. —— Attachment *ad fundandam jurisdictionem* — Fraud — Malicious sequestration—Lapse of time.

In an application by the respondent, on leave reserved, to discharge an order of attachment of his luggage, ad fundandam jurisdictionem, *to enable the petitioner to institute an action for damages for malicious and fraudulent sequestration of his estate, it appeared that the sequestration had taken place eighteen years previously, without any objection on the petitioner's part, although he was aware of the statements upon which it was based, and that, before the respondent went to reside beyond the jurisdiction, the petitioner had ample opportunity of instituting his action.*

Held, *that upon these facts the Court ought not to render active assistance*

PAGE

towards the bringing of the action by attachment, and that the order, which had been obtained without full disclosure of the above facts, must be discharged.

Lippert v. Marillac 330

Land—Sale—Error in transfer deed—Declaration of rights.

In January, 1881, G. *became the registered owner of certain two pieces of land, one measuring one square rood, and the other* 21 *square roods and 55 square feet, with a cottage thereon, and thereafter he erected another cottage on his land.*

In February, 1883, G. *sold by public auction the first mentioned cottage, together with the land on which it stood, to* B., *who took possession and remained in occupation until* 1894, *and the remaining land and cottage he sold to* A.

In the deed of transfer passed by G. *to* B. *the land on which the cottage stood was not included, and through error transfer was only passed of the* 1 *square rood.*

B. *in ignorance of the error accepted the transfer.*

The transfer deed in favour of A. *included the cottage and remaining ground bought by* B., *the land being described as measuring in extent* 21 *square yards and* 55 *square feet.*

A. *thereafter sold the property as he had bought it, and eventually in* 1891 *it was purchased by* H. *according to transfer deed and diagram, but he did not become aware that it included the cottage purchased by* B. *until some time after the sale to him, when he had the land surveyed.*

In an action for a declaration of rights instituted by H. *against* B., H. *was declared entitled to the cottage bought by* B. *in* 1883, *but compensation was given to* B. *in respect of improvements.*

Hudson v. Bradshaw 171

PAGE

Landlord and tenant—Defective roof—Damages—Liability.

Where a landlord with knowledge that there was a defect in the roof let certain premises and rain water come through the roof and damaged goods stored on the premises.

Held, *that the landlord was liable for the amount of the damage.*

Nannucci v. Wilson & Co. 283

Lease—Rent reserved—Option of purchase—Covenants—Breach—Interdict.

B. *by a deed of lease demised certain premises to* H. *for a term of five years at a reserved rent, payable on* 1*st January and* 1*st July in each year.*

It was provided inter alia *by the lease that if any rent reserved or any part thereof should remain unpaid for the space of three months after the time appointed for payment thereof, the lessor might, if so disposed, declare the lease cancelled.*

It was further provided that the lessee should have the right to purchase the premises at any time during the term of the lease for £5,000, *but should a satisfactory offer be made for the premises during the term of the lease by any other person or persons, the lessor should be bound and obliged to give the lessee the refusal of the same for thirty days at the price and upon terms so offered by such other person or persons.*

In March, 1894, *the rent not being three months in arrear*, B. *without giving* H. *the refusal of the property sold it for* £1,400 *and on the* 6*th April*, 1894, *gave* H. *notice that the lease was cancelled, the rent being more than three months in arrear.*

H. *applied for an interdict restraining the transfer of the property. In his petition he alleged that he had spent large sums in effecting improvements, but he did not specifically deny that the rent was in arrear,*

PAGE

The Court made no order on the application, but granted H. *leave to amend his petition by alleging either that no rent was in arrear, or that his claim for improvements exceeded the amount of the arrear rent, and directed that notice should be given to* B. *and to the purchaser that any dealing with the property would be at their risk.*

Ex parte Hill—*In re* Hill v. Bilborough 130

Legacy—*Jus accrescendi*—Intention—Will.

A testatrix bequeathed to her two grandchildren each one hundred morgen of land, situated respectively on the north and south sides of a certain stream "as a homestead and further" certain other land.

One of the legatees died before the testatrix.

The context of the will showed that the other land was intended to be accessory to the homestead.

Held, that the jus accrescendi *did not apply either to the homestead or to the other land bequeathed.*

Potgieter v. Van der Heever's Executor 66

Libel—Truth—Justification—Absence of malice—Benefit Society—Expulsion.

P., *a member of a Benefit Society, made certain charges against the secretary, which were investigated and found to be false.*

By the rules of the society any member in arrear with his subscription ceases ipso facto *to be a member, although he may be re-admitted to membership on payment of his arrears.*

P. *was in arrear with his subscription, and was expelled from the society.*

After the investigation as to the charges brought against the secretary, P. *reiterated the charges.*

The society thereupon inserted a notice in a local paper to the effect that the charges brought by P. *against their secretary were false, malicious and without foundation, and that* P. *had been expelled from the society.*

In an action in the Magistrate's Court for £20 *damages, brought by* P. *against the society for libel in publishing the notice, judgment was given for the defendants on the grounds that they were justified in publishing the notice, and that they had done so without malice.*

On appeal, *the Magistrate's judgment was upheld.*

Pietersen v. October and Others ... 146

2. ——Letter in newspaper—Inexperienced painter—Ignorance.

In January, 1894, tenders were called for by the Colonial Government for the performance of certain external painting work at the Houses of Parliament, Cape Town.

P. *and* C. *together with other painters tendered for the work and* P.'s *tender was accepted.*

No notice was given to the public as to who was the successful tenderer, nor was C. *aware that* P. *had obtained the contract.*

Some time after P.'s *tender had been accepted* C. *was passing the Houses of Parliament while the painting work was being carried out, and noticing the caretaker* (himself an experienced painter, of which fact C. was unaware) *giving one of the painters instructions as to how he should do his work, immediately concluded that the contract had been given to the caretaker, and being of opinion that this was unfair to the painters of Cape Town, wrote a letter to the editor of the "Cape Times" in which he remarked* inter alia *that the lowest tenderer for the painting work at the Houses of Parliament was not an experienced painter, and otherwise described him as being as unfit to do the work as a draper would be to undertake a contract for printing.*

PAGE

Held, *in an action for damages for libel instituted by* P. *against* C., *to which the defendant pleaded justification, that the words complained of amounted to a technical libel, and that* C.'s *ignorance that* P. *was the successful tenderer was no excuse in law.*

Proctor v. Christ 271

Life insurance—Proposal form—False answers—Material facts—Misrepresentation—Agency.

Where it was proved that a woman about to insure her life had given false answers to the questions in the proposal form knowing them to be false, and the doctor who examined her on behalf of the Insurance Company though not its regular medical officer, knew that some at least of the answers were false and yet signed the proposal form.

Held, *in an action by the woman's executor against the company for the amount of the policy, that the company was not liable.*

Spiers v. Mutual Life Insurance Company of New York 291

Life policy — Delivery — Effect — Will —Children—Tacit hypothec.

H. *and his wife were married without community of goods.* H.'s *wife died in 1887, and by her will she appointed her children by* H. *and a son of his by a former marriage sole heirs of her estate, which realised £6,150. She also appointed* H. *her executor, and directed that the whole of her estate should remain in the possession and under the control of her husband, until he should die or re-marry, to be used, applied, and invested without the interference of any person as he might think best for the benefit of the heirs, and after the death or re-marriage of* H. *she directed that the whole of her estate should be applied as in her will set forth.*

PAGE

In 1885 H. *effected an insurance of £1,000 on his life for the sole use and benefit of his wife.*

H. *after the death of his wife entered into possession of her estate in terms of the will, and in 1893 he had lost it all in speculation.*

B. *after the death of* H.'s *wife undertook at his request to board and educate his four minor children in consideration of his paying £20 a month and recouping* B. *for any moneys expended by her in clothing and education.*

H. *paid* B. *regularly until 1890, when his payments fell into arrear, and at his death in 1894 there was a large amount due to* B.

In August, 1893, H. *not being able to satisfy* B.'s *claim, which was then due, sent her the policy of insurance and also certain plate and jewellery which had belonged to his wife, requesting her to sell them and apply the proceeds in reduction of her account.* B. *retained possession of the policy and plate.*

Held, *in an action by* B. *against* H.'s *executor and heirs that the property in the policy, plate, and jewellery vested in* B. *and that no tacit hypothec in favour of* H.'s *minor children attached to the same.*

Buyskes v. Cosnett and Hurley's Heirs 301

Liquor licence — Bottle store — Sale after prohibited hours — Evidence sufficient to justify conviction.

The Court on appeal refused to quash a conviction for contravening the Liquor Licensing Acts where, although the evidence of the contravention was not strong, still there was sufficient, in the opinion of the Court, to justify the Magistrate in convicting.

Regina v. Havenga 269

2. —— Local option — New licence—Memorial—Act 25 of 1891, section 13, sub-section 1, section 15, sub-section 1)—Licensing Court.

PAGE

M. *applied for a new licence to carry on the business of a bottle store in the Municipality of Molteno and lodged a memorial in terms of Act* 25 *of* 1891, *section* 13, *sub-section* 1.

The memorial did not contain the signatures of a majority of voters registered in the Municipality for the election of members of the Divisional Council.

The Licensing Court, acting bona fide, *and in ignorance that the Secretary of the Divisional Council had not complied with section* 15, *sub-section* 1, *of the Act, granted the licence.*

The Supreme Court, on motion, set aside the proceedings of the Licensing Court as being illegal and gave costs against M.

Gibson and Morgan v. Manley and the Albert Licensing Court. Kerr and Pinnoy v. Manley and the Albert Licensing Court 196

Lost bond—Legal holder—Deeds Registry Act, 1891—35th Regulation.

Where it was proved to the satisfaction of the Court that the amount of a lost bond had been paid, but the declaration required by the 35th Regulation framed under the Deeds Registry Act, 1891, *could not be made as the address of the legal holder was unknown, the Court directed the cancellation of the bond.*

Ex parte Koller's Executors 32

2. —— Certified copy — Deeds Office —Practice.

The Registrar of Deeds will not issue a certified copy of a lost mortgage bond without an order of Court.

Ex parte Stone 138

Lunatic — Funds in possession of the Master.

The Court refused to direct the Master to pay out funds in his possession belonging to a person, who was alleged to be insane, for his support and maintenance, until such person had been declared of unsound mind.

Re Neethling 137

Magistrate's jurisdiction—Set-off—Exception.

T. *sued* W. *in a Magistrate's Court for* £13 17*s.* *being the balance of an original account of* £57 15*s.* 3d. *for work and labour done.*

Annexed to the summons was an account showing how the £13 17*s.* *was arrived at, namely, by deducting from the* £57 15*s.* 3d. *the following sums :* £30 (*advanced to carry on the work*), £6 18*s.* (*cash supplied*), *and* £7 0*s.* 3d. (*goods supplied*).

W. *excepted to the summons on the grounds that the amount in dispute was beyond the Magistrate's jurisdiction.*

W. *gave evidence and deposed that the item of* £30 *credited in the account annexed to the summons had nothing to do with the claim for work and labour done, and that that amount had been advanced by him to* T. *to enable the latter to buy land, and that he held* T.'s *promissory note for the amount.*

He denied T.'s *right to set off the amount of the promissory note against his claim for work and labour done.*

The Magistrate sustained the exception with costs.

Held on appeal, *that the Magistrate had jurisdiction, and that the case was governed by* Kruger v. Van Vuuren's Executrix (5 Juta, 162).

Theron v. Woolf 18

2. —— Splitting of claims — Abandonment of excess—*Res judicata.*

An agreement in the nature of a partnership having been dissolved by mutual consent the plaintiff rendered an account consisting of different items and showing a debit against the defendant of £239.

PAGE

The parties then agreed that the defendant should make a promissory note in the plaintiff's favour for £174, *in respect of the undisputed items of the account, and that the balance of* £65 *should be subject to future adjustment.*

To a summons in a Magistrate's Court on the note after it fell due, the defendant excepted on the ground that the plaintiff had split his claims and had not abandoned his claim for the balance of £65.

Held, *overruling the Magistrate's decision, that the exception was bad inasmuch as there was not such a legal connection between the two claims as to render a final judgment on the one capable of being pleaded as* res judicata *in an action on the other.*

Van der Heever v. Van Rooyen ... 73

3. ——Appeal—Costs.

Where a Magistrate had given judgment for the amount of a claim in convention and dismissed a claim in reconvention, and on appeal from his judgment it appeared that an amount beyond his jurisdiction was in dispute,

The Court, although no exception had been taken to the jurisdiction of the Magistrate, altered the judgment to absolution from the instance both on the claim in convention and reconvention, but made no order as to costs.

Horwitz v. Lloyd... 285

4. ——Counter claim—*Bona fides.*

J. *sued* K. *in the Magistrate's Court at Kimberley for delivery of possession of certain premises situated at Wesselton, and belonging to the De Beers Consolidated Mines (Limited), the lease of which he had bought from one* D. *on the 15th August, 1892.*

In the preceding month of July one R., D.'s *father, purported to sell the same premises to* K., *who paid* R. *the purchase price, entered into possession, and greatly improved the property.*

In the suit between J. *and* K. *the latter excepted to the Magistrate's jurisdiction on the grounds* (1) *that the property in question was in dispute, and* (2) *that the right of occupation was of the value of £40 and upwards to* K.

These exceptions having been overruled, K. *pleaded the general issue and claimed in reconvention £100 in respect of improvements.*

The Magistrate being satisfied as to the bona fides *of the claim in reconvention, dismissed the case for want of jurisdiction.*

On appeal, *the Magistrate's judgment was sustained.*

Jurgensen v. Kunjan 278

Marriage in community—Insolvency—Surplus.

Where the estate of a man married in community had been sequestrated as insolvent, and there was a surplus after paying the liabilities of the estate, the Court, on the petition of the insolvent's wife, who alleged that she was without means and ignorant of her husband's whereabouts, granted a rule nisi *calling upon him to show cause why one half of the surplus in the hands of the Master should not be paid to her at once, and the interest on the balance devoted to the support of his minor child.*

Ex parte Mewes 131

Master and servant — Contract of letting and hiring—Competition in trade with master—Misconduct.

In the absence of any express stipulation it is an implied term in a contract whereby a person lets his services for employment in any trade that he shall not enter into active competition with his master in that particular trade.

Eayrs v. Best 338

PAGE

2 ——Wrongful dismissal—Damages.
Where a servant sued his master in a Magistrate's Court for damages for wrongful dismissal, and in his evidence admitted that he had sustained no damages, and the Magistrate, without hearing the defendant's evidence, granted absolution from the instance on the grounds that the defendant was justified in dismissing the plaintiff.
The Court, *on appeal, refused to reverse the Magistrate's decision or to remit the case for further hearing.*
Viljoen v. Ras 348

3. —— Disobedience — Misconduct — Wrongful dismissal.
A cutter employed by contract in a tailoring business, having deliberately refused to obey his master's order that he should give work to a competent tailor employed in the same business, for whose work the master undertook the responsibility, was dismissed from the service.
Held, *in an action for damages for wrongful dismissal, that the order was a lawful one, and that the deliberate refusal to obey it justified the dismissal.*
Wasserman v. Levin 432

4. —— Desertion — Act 15 of 1856, chapter 5 (2)—Magistrate's discretion—*Ex parte* Sybel and Others ... 457

Merchandise Marks Act—False trade description—Cigar boxes — Labels —Forfeiture.
S. and D., *carrying on business at East London, imported on behalf of a Johannesburg firm the constituent parts of cigar boxes, consisting of pieces of wood from which the boxes were to be made, and also labels to be pasted or gummed upon the boxes, both wood and labels being manufactured in Germany.*
The pieces of wood were branded Perla de Cuba *and* Habana *and on some of the labels appeared the Spanish words* Fabrica de Tobaccos.
The boxes when put together were intended to contain cigars made in the Transvaal from Havana tobacco.
Held, *in an action for a forfeiture under the Merchandise Marks Act, that the goods in question contained a false trade description and were liable to forfeiture.*
Collector of Customs v. Spence and Drury 254

Minor—Money—Re-investment.
A mother authorised to re-invest money for the benefit of her minor daughter.
Ex parte Brown 212

2. ——Maternal inheritance — Partnership.
Under special circumstances and where it was clearly for the benefit of a minor, the Court authorised the Master to pay out to the minor the amount of his maternal inheritance to enable him to enter into a business partnership with his brother.
Ex parte Coetzee 33

3. ——Bond—Cancellation—Father and natural guardian.
Where a bond had been passed in favour of a minor, and the mortgagor was anxious to pay the amount of the bond and have it cancelled, the Court authorised the Registrar of Deeds to accept the cancellation of the bond by the minor's father as natural guardian.
The father to invest the amount of the bond for the best interests of his child.
Ex parte Hopkins 59

4. —— Will — Immovable property—Sale.
Where immovable property, which had been bequeathed to a minor, had become dilapidated, and there were no available funds wherewith to repair it, the Court, on being satisfied that it

PAGE

was clearly for the benefit of the minor, authorised the sale of a portion of the property.

A provision in a will that the immovable property shou'd remain in the family name as long as possible *held not to amount to a* fidei-commissum.

Ex parte Carey. *Re* Carey's Will ... 129

5. ——Capital.

Where it was clearly for the benefit of a minor to enable her to go to Europe to consult specialists as to her state of health, the Court authorised her tutor to sell £500 worth of Cape Government Stock, part of the minor's capital, to defray her expenses.

Ex parte Horne. *Re* the Minor Rademeyer 147

6. —— Father's right to custody — Interdict.

The Court, on being satisfied that a father owing to his intemperate habits and violence was not a fit and proper person to have the custody of his minor children, restrained him by interdict from removing them from the South African College School and taking them with him to America.

Woodford v. Woodford 148

7. —— Transfer of land — Want of consideration

Where land had been transferred without consideration by the father of certain minors, in his capacity as agent of an executrix, to himself, as father and natural guardian of his minor children, the Court refused to authorise him to re-transfer the property to the estate, leaving the executrix to her remedy by action against the minors.

Ex parte Glynn 124

Mohammedan Church — Imaum — Election — Congregation — Mogamat and Others v. Moliat 162

Monthly account — Final Account — Aerated water bottles — Deficiency — Breakages.

PAGE

Where monthly accounts were rendered by an Aerated Water Company to a customer, and the accounts showed the number of bottles received, the number returned and the deficiency, but on paying the account no demand was made for the price of the missing bottles until the customer had closed his account, when a demand was made for the price of all the bottles which had not been returned.

Held on appeal, *that the customer was justified in considering the payment of the monthly account a final settlement, and that the company regarded the bottles which were not returned as ordinary breakages, and consequently that the company, when the customer had closed his account, were not entitled to charge for all the bottles which had not been returned.*

Hope Aerated Water Company v. O'Callaghan 360

Municipal rate—Water rate—Valuation —Rectification of valuation—Act 12 of 1878—"Premises."

To a claim for Municipal rates under Act 12 of 1878 the defence in the Magistrate's Court was that the valuation of the plot of land in question included a wooden building which was movable.

Held, *affirming the decision of the Magistrate's Court, that the valuation was conclusive in that Court and that the proper course for the defendant was, in the first instance, to apply to the Town Council to rectify the valuation, and, if the Council refused, then to apply to a Superior Court for such a rectification.*

To a claim for a water rate on the building under section 9 of Act 12 of 1878 the defence was, inter alia, *that the building formed part of premises owned and occupied by the defendant for which an adequate tank had been provided,*

PAGE

Held, *that inasmuch as the plot with the building thereon had formerly belonged to a different owner, when a water rate was paid on the building, as the plot is separated from the rest of the defendant's property by a street, and as the building is used as an upholsterer's workshop, it cannot be regarded as part of the premises for which a tank exists and that therefore the water rate is payable.*

Randall v. Town Council of Graham's Town 39

Municipal Regulation—Beating drums or blowing instruments—*Intra vires*—Salvation Army.

The W. *Municipality constituted under Act 45 of 1882 passed the following municipal regulation* : No person or procession of persons shall at any time have the right to parade or proceed through the streets, screaming, shouting, yelling, beating drums or blowing instruments, without the consent first had and obtained from the Council or from some person duly authorised by them.

E. *and* others, *members of the Salvation Army*, were convicted *for contravening the above regulation, by marching in procession and playing their band through the streets of* W. *on Sunday the 19th August, 1894.*

Held, *on appeal, that the regulation was* intra vires *and that* E. *and* the others *had been rightly convicted.*

Edmunds and Others v. Wellington Municipality 306

Municipality — Erfholders — Water — —Common right—Conditions of sale—Prescription.

In the year 1812 the Government sold by public auction certain seventeen erven in the village of Caledon upon certain conditions of sale, including the condition that the erfholders should construct and maintain certain watercourses conveying water from an upper spring belonging to Government, and that such seventeen erven should, together with the erven of certain specified functionaries, be entitled to the use of such water for irrigation purposes.

The grants to the purchasers were made subject to such conditions, and the seventeen erfholders for the time being claimed and exercised the right to the exclusive use of the water for a period of eighty years.

Held, *in an action brought by the Municipality against the erfholders, that, even if the duly registered conditions of sale were not sufficient to give the seventeen erfholders the right to the exclusive use of the water, their subsequent user conferred a right by prescription upon them, and that the fact of their having permitted the Municipality to control the distribution of the water among themselves did not entitle the Municipality to deal with the water as if all the inhabitants had acquired a common right thereto under section 35 of Act 9 of 1836.*

Caledon Municipality v. Bougaard and Others 419

Native Locations—Act 33 of 1892, sections 7, 11, and 13—Conditional lease—Huts—Damages.

In July, 1893, H. *entered into a verbal agreement with certain natives, who had for some years previously occupied a private location on his farm, in terms of which he gave them the right to continue to live on the farm for twelve months at a certain fixed rent, conditional on his being able to obtain the services of a European overseer in terms of the Location Act of* 1892 ; *failing which the natives were to leave the location at the end of the year.*

H. *failed to obtain a European overseer and notified that fact to the natives in January*, 1894, *telling them at the same time that the loca-*

PAGE

tion would have to be broken up, and giving them seven days within which to vacate their huts and leave the farm.

The natives left the farm after their huts had been burnt down by H.'s *instructions.*

Thereafter certain of the natives brought an action for damages against H. *in the Magistrate's Court and judgment was given in their favour.*

On appeal, *the Magistrate's judgment was reversed.*

M'Lingwana and Hobbs v. Gola and Seko 225

Native marriage—Custom—Cattle.

Where two natives have been lawfully married by native custom the husband, on his wife's death, is not entitled to divert the cattle, apportioned according to custom to her house, to the house of his second wife although he may have married the latter by Christian rite.

Jeke v. Judge 132

Native Territories Penal Code — Act 4 of 1861 - Evidence without oath —Promulgation of law—Cession of territory—Allegiance—British subjects—Imperial Act, 26 and 27 Vic., cap. 35—Culpable homicide—Murder—Special Court of Pondoland West—Appeal.

On the record of a trial for murder, in contravention of the 142nd section of the Native Territories Penal Code, before the Special Court for Pondoland West, it appeared that the witnesses for the prosecution gave their evidence without being sworn but after being duly cautioned.

Held, *that the 12th section of Act 4 of 1861 was applicable to that Court, and that it must be presumed that the witnesses were found not to understand the nature of an oath, and that the admonition required by the section was duly given to them,*

PAGE

In a ceded territory the laws thereof remain in force until altered by the new sovereign power and those subjects who elect to remain in the territory become subjects of the new sovereign.

On the 20th of March, Western Pondoland was proclaimed to have been duly ceded to Her Britannic Majesty, and on the 3rd of April, 1894, the Governor of the Cape Colony was duly empowered to make by proclamation such laws as might to him appear necessary for the peace, order, and good government of the territory, but no such laws were made until the 22nd of May, 1894, on which day the Native Territories Penal Code was by proclamation in the Cape Government Gazette extended to such territory.

Held, *that the appellant, a Pondo who had elected to remain in the territory after the cession, did not, under the 1st section of the Imperial Act, 26 and 27 Vic., cap. 35, become amenable to punishment according to the Colonial Criminal Law for an offence alleged to have been committed by him after such cession and before the promulgation of the Penal Code.*

The indictment charged the appellant with having on the 22nd of May, 1894, committed murder in contravention of the Penal Code, but there was no proof that the publication of the Gazette on that day preceded the alleged commission of the offence.

Held, *that the proclamation of the 22nd of May in the Government Gazette was tantamount to a promulgation by virtue of the commission granted to the Governor on the 3rd of April, but that, in the absence of proof that such promulgation took place before the alleged offence was committed, or that by the law*

PAGE

of Pondoland murder was punishable with death, the appellant could not be tried for a contravention of the Code.

The evidence being barely sufficient to establish culpable homicide and quite insufficient to establish murder,

Held, *that a conviction and sentence for murder must be set aside by the Supreme Court as Court of Appeal.*

Regina v. Jizwa 380

Negligence — Railway accident — Destruction of mules — Damages — Contributory negligence—Mills v. Colonial Government 263

Non-negotiable note — Indorsement — Aval — Surety — Consideration — Benefit of division—Benefit of excussion—Renunciation of benefits—Principal debtor—Costs of excussion.

A person endorsing a promissory note which has not been endorsed by the payee prima facie *incurs the liability of an "aval" or surety for the maker to the lawful holder.*

A surety who has not renounced the benefit of division is entitled to a division of the debt pro rata *between himself and others who may after him have become sureties for the same debtor in respect of the same debt.*

It is a sufficient consideration for a contract to become an additional surety, that the creditor, after accepting such additional surety, is liable to be met with the exception of division in a suit for the debt against the first surety.

The costs of an unsuccessful suit brought by the creditor against the principal debtor cannot be recovered from a surety who has renounced the benefit of excussion, nor can they be recovered from a surety who has not renounced such benefit unless such action had been previously notified to him.

The case of Hurley v. Marais (2 Juta, 155) *followed.*

PAGE

Klopper v. Van Straaten 101

Non-performance of duty—Damages—Proximate cause—Resident Magistrate—Messenger—Security.

The omission to perform an official duty, which is not specially owing to a person sustaining damages by reason of such omission, does not confer on him a right of action for damages unless (a) *the duty is one which has been expressly imposed by law,* (b) *the damages claimed are the proximate result of such breach, and* (c) *no other remedy is expressly provided by law in respect of such omission.*

Haarhoff's Trustee v. Freislich 352

Notary—Master of Supreme Court—Will—Registration—Grosse.

A notary before whom a notarial will has been executed is bound, upon the death of the testator, to transmit the original in his possession for registration with the Master in terms of sections 3, 6 *and* 7 *of Ordinance No.* 104.

In case of the loss of the original the Master is justified, without further proof, in registering the notarial grosse.

The Master of the Supreme Court v. Berrange 86

2. —— Protocol—Lost deed—Fine.

Where on an examination of a notary's protocol by the Commissioners it was found that one deed was missing, and the notary could give no satisfactory explanation of its absence further than by alleging that it had been lost or mislaid, the Court ordered him to file in his protocol, within six weeks from the date of the order, a true copy of the deed bearing the full amount of stamps, and stamps amounting to £2 in addition as a fine, and further ordered him to pay the costs of the application to the Court.

Colonial Government v. Schermbrucker 60

PAGE

Notice of appeal—Failure to prosecute —Practice.

Where an appeal from a Magistrate's judgment has been noted, but not prosecuted within the required time, and it is sought to debar the appellant from appealing, notice should be given calling upon him to show cause why he should not be debarred from prosecuting the appeal.

Poswa v. M'Bukwe 419

Partners—Crime—Fraudulent contracting of debt — Special entry — Illegality of conviction—Criminal appeal.

A. *and* **B.**, *being partners, were convicted by a jury of fraudulent insolvency in having fraudulently contracted certain debts before their insolvency.*

The debts were contracted by **B.** *in Cape Town at a time when* **A.** *was at Beaufort West,, and beyond the fact that the prisoners were partners, there was not, in the opinion of the majority of the Court, any evidence of* **A.**'s *participation in or knowledge of* **B.**'s *fraud.*

No application was made to the presiding Judge for leave to make a special entry of the illegality of the conviction, but leave was afterwards given by the Supreme Court with the consent of the presiding Judge.

Held, *that in the absence of any evidence connecting* **A.** *with* **B.**'s *fraud, the conviction of* **A.** *was illegal.*

Regina v. Margolius 440

Pauper — 125th Rule of Court — Mechanical dentist — Professional etiquette.

Where a mechanical dentist, under an agreement for three years to serve the respondent at a salary of £4 per week, had left the employment because his employer was not a qualified dentist, and petitioned the Court for leave to sue his employer in forma pauperis *in an action for damages for misrepresentation,*

The Court held, *that the applicant was not a pauper within the meaning of the 125th Rule of Court.*

Dowers v. Goodman 446

Penalty—Liquidated damages—Conditions of sale — Sale of goods — Magistrate's jurisdiction.

A stipulation in conditions of sale that the purchaser should pay five per cent for collection on non-payment of the price within three days held to be not a penalty, *but reasonable compensation for the seller's risk in employing an agent (if such percentage is payable by the seller to his agent for collection and cannot be recovered by the agent from the purchaser on payment of the amount before issue of summons).*

Upon proof, therefore, that an agent has been so employed for collection, the percentage is claimable by the seller from the purchaser.

Such percentage cannot be included in an illiquid case in a Magistrate's Court for the recovery of the price of goods sold if the amount demanded exceeds £20.

Falconer v. Behr & Co 69

Perpetual silence — Action — Bar — Will—Legatees.

Where legatees had lodged an objection to a liquidation account, and publicly pretended that they had an action against the executors for amendment of the account, but had allowed four months to elapse without taking any further proceedings, the Court, on the application of the executors, ordered the legatees to bring their action within six weeks, failing which, to show cause why they should not be barred by a decree of perpetual silence.

Vermaak's Executors v. Vermaak ... 308

PAGE

Plea in abatement--Summons—Costs.

P. *sued* B. *for balance of account. The summons was issued on 5th September, 1892, but no further proceedings were taken.*

Subsequently P. *instructed other attorneys, and a second summons was issued on the 15th December, 1893.*

On the 5th April, 1894, the first summons was withdrawn, and on the 23rd May, 1894, the costs of the first summons were paid by P.

On the 28th May, 1894, B. *filed a plea in abatement and prayed that* P.'s *declaration and summons might be quashed.*

The Court *overruled the plea in abatement with costs, but gave* B. *leave to plead within three days.*

Partridge v. Blake 280

Police-constable — Misconduct — Dismissal — Resident Magistrate — Ordinance 25 of 1847.

A Resident Magistrate has no authority, under Ordinance 25 *of* 1847, *to dismiss from the force a police constable who has been guilty of misconduct.*

The proper course to be adopted in such cases is laid down in section 6 *of the Ordinance.*

Regina v. Willem Wentzel 192

Post-nuptial contract—Registration.

Where a post-nuptial contract had been registered in ignorance of the fact that the contracting parties who had intended to exclude community were married at the date of its execution, the Court ordered the contract as registered to have the effect of an ante-nuptial contract, saving the rights of creditors who became such prior to the date of registration.

Ex parte Loots and Wife 239

Power of attorney—Revocation—Sale of land—*Fidei-commissum.*

Where a testamentary executor had given a power of attorney authorising the person to whom it was given to administer the estate, and the latter acting under the power had sold landed property burthened with a fidei-commissum, *the Court refused to grant an order restraining the holder of the power from giving further effect to it, leaving the applicant to his remedy by action for maladministration.*

Prins' Executor v. Lind 4

Prescription — Trust-money — Acknowledgment of debt—Will—Legacy.

S. *at the age of six months or thereabouts became deaf and dumb and remained so during life.*

On the death of her parents in 1872 S. *went to live with* J. *and his wife, and while so living with them* J. *received on her account* £100, *which had been bequeathed to her by her grandparents.*

J. *died in* 1879 *without having paid the* £100 *to* S.

Under J.'s *will his wife was appointed executrix and took out letters of administration, and in an account which she filed with the Master she brought up the* £100 *as a debt due by her husband's estate to* S.

Thereafter in 1881 J.'s *wife, being as she thought on the point of death, wrote an acknowledgment of the debt of* £100 *due to* S., *and handed the acknowledgment to one* B.

J.'s *wife died in* 1892 *without having paid the* £100 *to* S., *but by her will she gave* S. *a legacy of* £100.

After the death of J.'s *wife her executors refused to recognise* S.'s *claim in respect of the debt of* £100 *on the grounds that it was prescribed.*

Held, *in an action against the executors for the debt of* £100 *and for the legacy of* £100, (1) *that prescription had not run as against the first* £100 *inasmuch as it was trust-money, and* (2) *that the legacy of* £100 *was intended to be in discharge of the debt.*

Strydom v. Jacobs's Executors 221

PAGE

Principal and agent—Interest on disbursements—Commission—Implied contract — Consent — Payment under protest.

A., *an importer of machinery carrying on business at Johannesburg, employed* M. & Co. *as his landing agents at East London, upon certain specified terms.*

These terms were silent as to interest or commission chargeable on disbursements to be made by M. & Co. *on behalf of* A.

For a year from the date of their employment M. & Co. *charged* A. *with interest at 8 per cent. on their outlay and he settled the accounts without any demur.*

After the lapse of a year, M. & Co. *in their accounts debited* A. *with a commission of two-and-a-half per cent. on the outlay in addition to interest thereon, but* A. *immediately on receiving the first debit note objected, and suggested an interview with* M. & Co.'s *manager at Johannesburg for the purpose of coming to an arrangement.*

At the interview the manager said that M. & Co. *would have to charge the commission and* A. *answered that he would think about it.*

After that A. *continued to employ* M. & Co., *who continued to debit him in their accounts with commission but he never consented to pay it, and there was always a balance against him on the accounts in excess of the amount of commission.*

This mode of dealing having continued for some time, M. & Co. *threatened to retain some machinery which they had in hand unless* A. *paid the amounts appearing due to them, including interest and commission, whereupon* A. *paid the money under protest.*

Held, *in an action brought by* A. *to recover back the money, that* (1) *inasmuch as he made no objection to the interest charged, which was in accordance with mercantile usage, and having thus induced* M. & Co. *to make subsequent disbursements on his behalf, there was evidence of a contract to pay such interest, but that* (2) *as to the commission, there was no evidence of a contract to pay the same, nor was it in accordance with mercantile usage to charge it in addition to interest.*

Ainsworth v. Mosenthal & Co. 415

2. —— Commission—Irrevocable power of attorney—Assignment—Reasonable time.

An agent appointed to sell his principal's assets for distribution among his principal's creditors is not entitled to charge fees for attendances at sales of land in addition to his commission of two-and-a-half per cent. on the proceeds of such sales, nor can he charge the principal with five per cent. for collecting rents in addition to five per cent. paid to his sub-agent. A power of attorney, purporting to be irrevocable and authorising the agent "forthwith" to sell the principal's assets and pay the proceeds to his creditors, who agree not to sue him until after such distribution, but containing no formal assignment of such assets or release of the principal after distribution of such assets, may be revoked by the principal after the lapse of a reasonable time for such realisation if such revocation does not prejudice the agent.

Koch v. Mair 88

3. —— Concession—Cession of action — Ownership — Fraud — Theft — *Vindicatio.*

An agent who improperly applies the funds of his principal towards the purchase of a concession for himself is liable to account to the principal for all profits made out of such concession.

PAGE

The unauthorised purchase of such a concession in the agent's name does not vest the ownership in the principal so as to enable him to follow it up in the hands of third parties who had acquired cession thereof bona fide *and for valuable consideration.*

The declaration stated that the manager of the plaintiff bank improperly and fraudulently purchased a certain mining concession with moneys belonging to the bank and afterwards sold and ceded his rights of action to the defendants, but did not allege that the defendants purchased with knowledge of the manager's fraud.

Held, *on exception, that in the absence of such an allegation, the declaration disclosed no ground of action to compel the defendants to account to the bank for all profits made by them out of the concession.*

Liquidators Cape of Good Hope Bank v. De Beers Mines and Dunkelsbuhler & Co.... 451

Promise by advertisement—Acceptance — Consideration — Condition—Conveyance of goods.

The defendant company having published an advertisement to the effect that they would convey goods at certain rates from Port Beira to Salisbury on the arrival of certain steamers, and that for further particulars application must be made to the company's agents at such port, discovered that the route was so difficult as to be really impracticable and instructed their agents not to forward any goods until further orders.

Held, *that there was no such definite and unconditional promise as to entitle any one of the public to damages against the company upon its refusal to convey goods from Beira to Salisbury.*

The mere acceptance of goods does not amount to a promise to convey them to their destination if no bill of lading or way bill was given, and it was verbally understood that they would be conveyed only part of the way.

PAGE

Fraser v. Frank Johnson & Co. ... 79

Promissory note—Lost bond—Certified copy—Stay of execution—Costs.

On the 13th December, 1893, C. *signed a promissory note in favour of* K. *for* £230, *payable on the 14th December,* 1893.

At the time the promissory note was signed a bond for £230 (in settlement of which the promissory note was given) *passed on the 12th June,* 1882, *by* C. *in favour of* K., *was still registered in the Deeds Office.*

K.'s *agent at the time the promissory note was signed represented to* C. *that the bond, duly cancelled, would be returned to him on the following day* (the due date of the note).

On the due date C. *tendered the amount of the promissory note on condition that the bond was delivered to him, owing however to the loss of the bond this could not be done, and* C. *refused to pay the amount of the promissory note.*

K. *sued* C. *on the note and obtained judgment with costs, stay of execution being ordered pending the delivery of the bond to* C.

In a cross appeal the Court varied the Magistrate's judgment by inserting after the word bond the words "or a copy thereof" and authorised the Registrar of Deeds to issue a copy of the bond duly cancelled.

The Court held that the Magistrate was justified in ordering a stay of execution and in giving K. *his costs.*

Each party was ordered to pay his own costs of appeal.

Koch v. Carslaw. Carslaw v Koch ... 24

2. —— Liquidity — Act 43 of 1885, section 5 (*a*) — Magistrate's jurisdiction.

PAGE

Stephan Brothers *sued* Engelbrecht *in the Magistrate's Court on a promissory note for* £62 2*s.* 6*d. made by one* Visser *in favour of one* Smit.

On the back of the note appeared the signatures of Smit *and* Engelbrecht.

The Magistrate granted absolution from the instance on the grounds that the claim was illiquid and beyond his jurisdiction.

On appeal, *the Magistrate's judgment was upheld.*

Stephan Bros. v. Engelbrecht 236

3. —— Burden of proof — Evidence —Denial of signature.

In an action against the alleged makers of a certain promissory note they pleaded a denial of their signatures, whereupon the plaintiff produced the note and closed his case.

The defendant applied for absolution from the instance, which the Magistrate refused.

Held, *that in the absence of any proof that the defendants were the makers of the note, the Magistrate ought to have absolved the defendants from the instance instead of giving judgment for the plaintiff.*

Bright and Boulton v. Durwood's Executors 363

4. —— Denial of signature—Appeal—Remittal for further evidence — Joubert v Van der Merwe .. 347

Provisional sentence—Promissory note —Want of consideration.

L. *was indebted to the estate of* M. *in the sum of* £176 2*s.* 9*d.*, *and on demand being made for payment asked for an extension of time within which to borrow the money.*

An extension of three months was given and L. *passed his promissory note for the amount of the debt in favour of the executor payable three months after date.*

The executor's agent charged L. *a commission of* 4½ *per cent. on the amount of the claim, and* L. *signed a promissory note for* £7 1*s. in favour of the agent, payable on the same date as the note for* £176 2*s.* 9*d. The agent endorsed the note for* £7 1*s. in blank, and the notes not being paid on the due dates, the executor as the legal holder claimed provisional sentence on both.*

The Court refused provisional sentence on the note for £7 1*s. on the ground that the agent had given no consideration for it.*

Metelerkamp's Executor v. Landman ... 237

Public road—Swing-gate—Fence—Act 40 of 1889.

It is not necessary that a swing-gate constructed under the 153rd section of Act 40 *of* 1889 *should swing on both sides of the fence on which it is placed.*

It is not necessary that such a fence should form part of a complete enclosure, provided that it has been constructed not for the purpose of delaying free passage over a public road, but bona fide *for the use and convenience of the owner.*

Regina v. Neethling 7

Purchase and sale—Broker's note—Evidence of assent.

While negotiations were in progress between the plaintiff and the defendant, for the purchase of certain houses, and before any definite arrangement as to the terms of payment had been arrived at, the plaintiff's broker sent a broker's note to the defendant after business hours in the afternoon, but the defendant returned it on the following morning claiming that interest on unpaid purchase money should be five, and not six, per cent.

The broker sent the note back to the defendant, who did not again return the note, but sent a message, which was duly delivered, to the broker, saying that he repudiated the note unless five per cent. interest were agreed upon,

PAGE

Held that, *as the broker's note was returned by the defendant within a reasonable time after he first received it, and as it was again repudiated after it was sent back to him, the mere subsequent retention of the note was not sufficient evidence of an acceptance by him of the terms stated in the note.*

Falconer v. Walder 392

Res judicata—Plan of distribution—Plan of contribution—Confirmation of plan—Insolvent law—Costs of sequestration.

Where the free residue of an insolvent estate is insufficient to pay the cost of sequestration, the confirmation by the Court of the trustee's plan of contribution has not the effect of res judicata *as against creditors, who have proved their claims, and who are specified in such plan as being liable to contribute* pro rata *towards payment of such costs.*

Steyn's Trustee v Gous 356

Review—Irregularity—Appeal—Courts of Griqualand East—Jurisdiction—Refusal to exercise jurisdiction.

Under Proclamation 112 of 1879, Courts of Resident Magistrates in Griqualand East have jurisdiction in actions for damages brought by a husband against persons who have committed adultery with his wife.

The refusal by the Court of the Chief Magistrate to hear an appeal in such an action on the ground that the Magistrate's Court had no jurisdiction to entertain the action constitutes a ground for reviewing and, if necessary, setting aside the proceedings of such Court of the Chief Magistrate.

A. *having obtained judgment in the Court of the Magistrate of Matatiele for damages against* B. *for adultery with* A.'s *wife,* B. *appealed to the Court of the Chief Magistrate, who refused to hear the appeal, but reversed the judgment on the ground that the Magistrate's Court had no jurisdiction.*

Held, *that such refusal was an irregularity which constituted a ground of review.*

Proceedings accordingly set aside and case remitted to the Court of the Chief Magistrate for the hearing of the appeal.

Clegg v. Greene and the Acting Chief Magistrate of Griqualand East ... 361

Scab Act — Knowledge of infection — Owner of sheep.

Although the existence of scab among sheep raises a presumption that the owner knew of it, such presumption may be rebutted by clear proof to the contrary.

An owner of sheep cannot be convicted of a contravention of the 7th section of Act 28 *of* 1886 *if it is proved that neither he nor his manager, employed to look after his sheep, was aware of the existence of scab among the sheep.*

Regina v. Wright 104

Scotch Law Agent — Application for admission as an attorney of the Supreme Court—Charter of Justice, section 19.

A Scotch law agent, not being a Writer to the Signet, who is qualified to practise in the Sheriff Courts in Scotland, but who has not paid the fees necessary to qualify him to practise before the Court of Session, is not entitled to be admitted as an attorney of the Supreme Court.

He may however be admitted to practise in Circuit Courts under Rule of Court 198.

Ex parte Milligan 114

Seduction — Damages — Maintenance — Kruger v. Van Reenen 372

Senatus—Consultum Velleianum—Consideration — Suretyship—Woman—Exception.

PAGE

A woman who promises to pay the amount of a debt owing by another loses the protection of the Senatus —Consultum Velleianum *if she has received good consideration for the promise.*

The summons in a Magistrate's Court alleged that in consideration of the plaintiff releasing one C. *from custody under a writ of civil imprisonment the defendant, a woman keeping a boarding-house, promised to pay the plaintiff a certain sum of money owing by* C.

It appeared that it was for the benefit of the defendant that C., *who was a boarder with her, should be released.*

An exception to the summons on the ground that the defendant was a woman having been allowed,

Held, on appeal, *that as the summons* prima facie *disclosed good consideration for the defendant's promise, the case ought to have been heard on its merits, and the case was remitted accordingly.*

Bevern's Trustee v. Kretschmar ... 26

Shares — Attachment — Discharge of order.

Where shares in a gold-mining company registered in the name of I., *who was domiciled in the South African Republic, had been attached to found jurisdiction in an action about to be instituted against* I., *and it afterwards appeared that the shares, although registered in the name of* I., *were really the property of* D. & Co. *for whom they had been acquired by* I. *as their agent, and* I. *on ceasing to represent* D. & Co. *had handed the share scrip to* D. & Co.'s *new representative, who had received dividends on the shares on behalf of his principals, but the shares had not been transferred in the company's books in the name of* D. & Co. *because the company was in liquidation,*

The Court on the application of D. & Co. *discharged the order of attachment, but made no order as to costs.*

PAGE

Dunkelsbuhler v. Liquidators Cape of Good Hope Bank 202

Slander — Privileged communication— Damages.

D. *acting* bona fide *and without malice, told* L., *the wife of one of her husband's tenants, that* L.'s *daughter* E., *a child of 13, was in the family way by one* R.

E. *had been in the service of* D. *and used to attend* D.'s *Sunday-school.*

The statement made by D. *to* L. *with regard to* E. *was untrue.*

Held, *in an action for damages for slander brought by* R. *against* D., *that the communication made by* D. *to* L. *was privileged.*

Roberts v. Duthie 287

2. —— Defamatory words spoken in anger—Absence of provocation.

In the absence of provocation it is no defence to an action for slander that the defamatory words complained of were spoken in anger.

Wilhelm v. Beamish 19

3. —— Damages — Exception —Appeal —Van Rooi v. Myburgh 350

Spes successionis — Sale — Sanction by Court.

B. *and his wife by their mutual will bequeathed to one of their sons* F. *a farm, but directed that if* F. *died childless the farm should, after his and his wife's death, pass to his three brothers, or in case they predeceased him, to their lawful descendants and heirs.*

F. *became insolvent, and his interest in the farm was sold to one* N.

At the age of 61 F. *was childless, although he had been married twice, his second wife being 45 years of age at the date of the petition.*

N. *having offered £825 for the contingent interest of* F.'s *three brothers and their children in the farm the Court, on the petition of* F.'s *brothers*

PAGE

sanctioned the sale of their interest to N. for £825, and directed the purchase price to be paid into the Guardian's Fund, there to remain during the lifetime of F. and his wife.

Ex parte Burger—*Re* Burger's Will ... 105

Spray pump—Machinery for agricultural purposes — Act 1 of 1889, Schedule B.

A Vermoral spraying pump is machinery for agricultural purposes, and as such, is duty free under Schedule B of Act 1 of 1889.

Rudd v. Colonial Government 142

Summons—Provisional sentence—Rule 329 (*d*)—Judgment by default.

Judgment by default was prayed under Rule 329 (d) upon an illiquid summons for the amount of a promissory note, copy of which had not been served on the defendant as required by the 12th Rule of Court in liquid cases.

Held, *that the 329th Rule was not intended to put an end to the system of provisional sentence in undefended cases and judgment by default refused accordingly.*

Fletcher & Co. v. Froneman 3

2. —— Amendment–Appeal—Variance.

Where there is such a variance between the summons and the evidence in a Magistrate's Court case that, without an amendment of the summons, judgment cannot be given for the plaintiff, but no amendment is applied for, he is not entitled on appeal to the Supreme Court against the judgment to obtain such an amendment.

Independently of contract, a false representation causing damage is not actionable unless it is fraudulent, and it would be fraudulent if made recklessly without regard to its truth or falsehood

Dickson & Co. v. Levy 51

PAGE

3. —— Exception — Loan — Negligence —*Actio commodati.*

To a summons for damages in a Magistrate's Court alleging in effect that the plaintiff had lent a certain horse to the defendant, who instead of taking reasonable care of it, drove it further than he had agreed to drive it, and otherwise so negligently used it that it died from the ill-treatment, the defendant excepted on the ground that it disclosed no right or title in the plaintiff to institute the action.

Held, *reversing the decision of the Court below, that* prima facie *it is the lender who is entitled to bring the action to recover the thing lent or its value, that it lies upon the borrower to raise any special defences which he might have to the lender's claim, and that the summons disclosed a sufficient title in the plaintiff to institute the present action for damages.*

Doubell v. Tipper... 37

Theft—Mules—Conditional sale.

L. sold two mules to T. subject to the condition that they were to remain L.'s property until the last instalment of the purchase price had been paid. Before the first instalment had been paid T. bartered the mules for other property.

Held, *on appeal, that T. had been rightly convicted of the theft of the mules.*

Regina v. Tobias 313

2. —— Evidence of accomplices—Conviction.

Where A. was convicted of theft on the evidence of two accomplices, who were believed by the Magistrate, the Court on appeal refused to quash the conviction.

Regina v. Adams 122

3. —— Ostrich feathers–Evidence sufficient to justify conviction—Regina v. Simonhoff 438

PAGE

4. —— Conviction sustained on appeal— Regina v. Salmon Klaas 153

5. —— Evidence sufficient to convict — Review — Regina v. Solomon Meyer 348

Town Council—Regulations—Refusal to sanction plans—*Mala fides*—Unreasonableness.

In an application for an order on the Town Council of Cape Town to consent to certain alterations to a house belonging to the applicant according to certain plans submitted to the Council.

Held, *that mere unreasonableness on the part of the Council in refusing to sanction the plans would not justify the interference of the Court unless it were proved that such Council as a body was influenced in its refusal by dishonest, fraudulent, or otherwise wholly improper motives.*

Clark v. Town Council of Cape Town ... 42

Trade mark — Infringement — Pipes — Interdict.

Held, *in an application for an interdict, that the use of the letters* RRR *placed triangularly in a triangle on pipes was an infringement of the registered trade mark* BBB *placed triangularly in a diamond.*

Frankau & Co. v. Pope 210

2. —— Infringement — Candles — Interdict.

The Court granted an interdict restraining the respondents, a firm carrying on business in Port Elizabeth, from selling candles manufactured by them and bearing on the wrappers the device of a ship in full sail, on the grounds that the device was an infringement of Price's well-known trade mark, although the ship as used by the respondents was differently rigged to that of Price's.

Price's Patent Candle Company (Limited) v. Everitt & Co. 211

PAGE

3. —— Cigarettes — Maker's name — Illegal use of—Interdict.

Where a trade-mark consisting of the words "The Noted Camp Cigarettes" *was sold by order of Court, but the maker's name formed no part of the trade-mark, the purchasers were restrained by interdict from using the maker's name in conjunction with the words* "The Noted Camp Cigarettes."

Lewis v. Holt & Holt 115

Trees — Act 28 of 1888—Summons—Evidence — *Onus probandi* — Sanction of Commissioner — Regulation—*Ultra vires.*

The 13th section of Act 28 of 1888 places under the control of the Commissioner of Crown Lands "trees planted on roadsides not being private property," *and authorises the Commissioner to make regulations for their protection under such penalty as may thereby be provided.*

A summons for a contravention of a regulation so made is not bad merely because it omits to state that the previous sanction of the Commissioner to the cutting down of such trees had not been obtained, if the summons specifies the regulation and otherwise indicates the exact nature of the charge.

If the question whether such previous sanction has been given is peculiarly within the knowledge of the defendant, very slight prima-facie *evidence of the absence of such sanction is sufficient to shift the burden of proof from the prosecutor to the defendant.*

The "trees on roadsides" *contemplated by the Act are trees which serve to protect the roads in question from the action of the sun, wind, or rain.*

A regulation, if authorised by the Act, must be obeyed even though it be deemed to be unreasonable.

Home v. The Conservator of Forests ... 335

PAGE

Trespass—Damage—Interdict—Greef v. Van der Westhuysen 28

Trust — Death of trustees — New appointment.

Where money had been settled on trustees resident in England, and they had invested it in landed property in this colony, and had subsequently died, and their executors refused to administer the trust, the Court on the application of the cestui que trust *appointed a new trustee.*

Ex parte Bryant 6

Undue preference—General bond—Past and future advances—Ordinance 6 of 1843, section 84.

J. *four months before his estate was sequestrated as insolvent, and at a time when he was heavily in debt, passed a general bond in favour of* F. & Co., *to cover past and future advances.*

Held, *in an action by* J's *trustee against* F. & Co., *to have the bond set aside as an undue preference under the 84th section of the Ordinance, that the bond so far as it covered past advances was an undue preference and should be set aside.*

Jordaan's Trustee v. Fletcher & Co. ... 64

Usufruct—*Fidei-commissum*—Right of reversion — Vesting — Will — Insolvency—Rehabilitation.

The question whether or not a testamentary gift is to vest in the object of the gift immediately upon the death of the testator is a question of intention. Where the gift is in favour of a person in existence at the time of the testator's death, without any intimation of a desire to suspend or postpone the operation of the gift, there exists a conclusive presumption that the testator intended to confer an immediately vesting interest.

Where the operation of the gift is suspended pending an intervening life interest, the presumption, in case the person having the life interest is a usufructuary, is that the gift was intended to vest upon the death of the testator, and in case such interest is in the nature of a fidei-commissum *the presumption is that the vesting was intended to be postponed until the death of the fiduciary heir or legatee. The case of* In re Zipp (Buch, 1878, p. 132) *explained.*

A husband and wife, by their mutual will appointed the survivor as sole heir, and by their codicil bequeathed, "after the death of the survivor," *a certain farm to the plaintiff.*

Held, *that a usufruct was conferred on the survivor, that the right of reversion vested in the plaintiff upon the death of the first dying, and that this right having accrued before the confirmation of the account in the plaintiff's insolvent estate vested in his trustee.*

Strydom v. Strydom's Trustee 430

Vagrancy — Wandering — Act 23 of 1879, section 4—Act 27 of 1889, section 2—Presumption—Failure to rebut.

Where K. *had been convicted of wrongfully and unlawfully wandering over a farm without the permission of the owner, and the Magistrate who convicted found as a fact that* K. *was wandering about the farm for the purpose of stealing honey, and that consequently the presumption raised by section 4 of Act 23 of 1879 had not been rebutted, the Court on appeal refused to set aside the conviction.*

Regina v. Kukkuk 311

Vindicatio—Stolen money — Bank note —Negotiable instrument—Market-overt—Judicial sale.

A person from whom money has been stolen is not entitled to recover it back from another who has bona-fide *received it for value.*

The same rule applies to any negoti-

PAGE

able instrument which has been placed in such a state that the maker can be sued thereon by any bona-fide *holder and which is by commercial usage treated as cash.*

A Bank of England note for £5 having been stolen from the plaintiff he prosecuted the thief to conviction, and thereafter brought an action to recover the note or its value from the defendant, a merchant, who in the ordinary course of business had bona fide *received the note as cash and for value from the thief.*

Held, *reversing the judgment of the Magistrate, that the plaintiff was not entitled to succeed.*

Questions of market-overt and judicial sales discussed, and the cases of Van der Merwe v. Webb (3 E.D.C., 97); Retief v. Hammerschlag (1 Kotze's Rep., 198); and Lange v. Liesching (Foord's Rep., 55) *commented upon.*

Woodhead, Plant & Co. v. Gunn ... 20

Will—"All our children"—Construction.

R. *and his wife executed a mutual will, which contained* inter alia *the following provision:* "Further we declare it to be our express wish and desire that the immovable property belonging to our estate, that is, De Plaat (now our dwelling-place) and portion of the farm Schalkwyk's River, remain in the undisturbed possession of the survivor until his or her death, when the same shall have to be publicly sold, when *all our children* shall come in as heirs in equal shares as regards the proceeds of the same."

R. *and his wife had no issue of their marriage, but by a previous marriage* R. *had nine children, and his wife by a previous husband two children.*

Held, *that the expression* all our children *referred to the children of both the previous marriages, and that each such child or his representative was entitled to* $\frac{1}{11}$*th of the proceeds of the property.*

PAGE

Rossouw's Executor Dative and Heirs v Rossouw's Executor Testamentary 289

2. —— House—*Fidei-commissum.*

Where a house had been bequeathed to seven legatees subject to the condition that it should not be sold before the death of the longest living of them, and that the proceeds should be then divided among their children, and one of the legatees, with the consent of the others, had sold the house to the Colonial Government, the Court refused to authorise the Registrar of Deeds to register the transfer.

Ex parte Nadea.—*Re* Nakiba's Will ... 215

3. —— Presumption of death—Executors testamentary.

Where a person, who had made a will, had been absent from the Colony for 42 years and there was strong presumption that he had been lost at sea, the Court granted a rule calling upon all persons interested to show cause why the will and death notice should not be filed, and letters of administration granted to the executors named in the will.

Ex parte Hunt 317

4. —— Children and grandchildren—Representation.

Husband and wife by their mutual will appointed "the survivor of them together with the children begotten or to be begotten by their marriage (in case of predecease of any of the children then the lawful descendants of the deceased by representation), *as his or her heirs."*

One of the children had died before the execution of the will leaving the plaintiff, an only child.

Held that, *after the death of the first dying testator, the plaintiff was*

PAGE

entitled to an equal share with the testators' surviving children of the estate of the first dying testator.

Michau v. Michau's Executor 384

5. —— Validity.

The Court refused to decide on motion as to the validity of a will which was alleged to have been improperly executed.

Ex parte Dickerson. — *Re* Jamieson's Will 158

6. —— Children—Grandchildren—Representation—*Jus accrescendi*—Life interest—*Fidei-commissum.*

A testatrix appointed her only child, a daughter, as sole heir subject to a fidei-commissum *and directed that after the death of the daughter and her husband, all the children of her said daughter were to receive the interest on the capital inheritance in equal shares,* "whilst only after the death of her (the testatrix's) grandchildren the said capital inheritance shall respectively in proportion to the number of the testatrix's grandchildren and in so far as each one's share in it is concerned devolve as free and unincumbered property upon her great grandchildren."

Held, *that on the death of each grandchild his or her children step into the place of such grand-child and are entitled to the capital of the share on which such grandchild has enjoyed the interest.*

Stegman v. Board of Executors, N.O. ... 439

Wills Ordinance, No. 15 of 1845, section 3—Intestacy.

H. *by his will bequeathed a specific legacy of* £50 *to his sister and the remainder of his estate to his wife* (whom he appointed his executrix) *for the maintenance and support of herself and children.*

The will was written throughout in the handwriting of the testator but was only attested by one witness.

Held, *that the will was not a privileged will and that* H. *had died intestate.*

Ex parte Herbert.—*Re* Herbert's Will 111

Winding up by Court — Voluntary winding-up— Powers of liquidator — Sale of assets — Compromise — Scheme of reconstruction — Minority of creditors.

In the course of the winding-up by the Court of the B. *Company a scheme of reconstruction was adopted by a majority of the creditors and contributories, under which a new company was to be incorporated with the same name as the old, but with a larger share capital, and the unsecured creditors were to receive debenture stock at par for their claims as proved. A minority at the meeting, being unsecured creditors, objected to the scheme, and upon application to the High Court of Griqualand by the debenture holders of the old company for a sanction of the scheme the minority appeared to object.*

Held, on appeal, *that the High Court properly refused to sanction the scheme as not being within the powers of the liquidator of a company in the course of being wound up by the Court and not voluntarily.*

In re The North-Eastern Bultfontein, in Liquidation 399

Work and labour — Settlement — Counter-claim.

Where judgment had been given in a Magistrate's Court for the original defendant on a claim in reconvention, the amount claimed having been included, as the appellate Court found, in a previous settlement arrived at between the plaintiff and the defendant, the Court altered the Magistrate's judgment to judgment for the defendant in reconvention and gave him his costs of appeal

Constable v. Theron 270

PAGE

2. —— Absence of agreement as to price—Fair and reasonable charges.

Where no agreement had been entered into as to the cost of certain carpentry work, the Court refused to reduce the prices charged, being satisfied that they were fair and reasonable.

Cordes v. Moorrees 386

Written agreements—Cession—Declaration of rights — Heydenrych v. Farmer 44

PAGE

Wrongful dismissal—Salaried official —Volunteer Corps—Misconduct.

A salaried official of a Volunteer Corps, who, in the presence of members of such Corps, falsely and deliberately asserts that the officer in practical command of the Corps has been guilty of an offence which would unfit him for command and expose him to severe penalties, is guilty of misconduct for which he may be dismissed.

Leonard v. Scott 374

Stanford Law Library
3 6105 063 309 251